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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, *et al.*,
*Petitioners*,

v.

SELWYN A. ROBINSON, *et al.*,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## APPENDIX TO THE PETITION FOR CERTIORARI

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# APPENDIX A

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Selwyn A. ROBINSON, *et al.*,
*Plaintiffs-Appellees*,

v.

George R. ARIYOSHI, Governor, *et al.*,
*Defendants-Appellants*,

and

McBryde Sugar Company, Limited, *et al.*, *Defendants*.

No. 78-2264.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 12, 1984.

Decided Feb. 20, 1985.

Rehearing Denied May 14, 1985.

Before GOODWIN and TANG, Circuit Judges, and GRANT [*], District Judge.

GOODWIN, Circuit Judge.

The district court, in an action brought under 42 U.S.C. § 1983 challenging an alleged threat to divest plaintiffs' irrigation water rights, enjoined the named state officials from taking any action to enforce a recent decree of the state courts that appeared to be adverse to the property rights of the plaintiffs. The state officials appeal, raising a number of procedural and substantive issues. We will first set out the factual context in which this dispute has kept territorial, state, and federal courts intermittently busy for more than sixty years.

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[*] The Honorable Robert A. Grant, United States District Judge, Northern District of Indiana sitting by designation.

## Background

In 1889 the predecessors in title of the plaintiffs, Gay and Robinson, owned substantial land grants within the ahupuaa of Hanapepe, a local designation of land extending from the top of the central mountain mass of the Island of Kauai to the sea and roughly encompassing the drainage of the Hanapepe River. At the mauka, or upper part of the ahupuaa, the annual rainfall ranges from four to five hundred inches. At lower elevations rainfall averages as little as twenty-three inches and in many parts of the ahupuaa most types of agriculture are not possible without irrigation.

In the early days of the development of sugar cane fields on Kauai, the owners and lessees of the privately-owned lands built dams, flumes and ditches in order to distribute the abundant rainfall from the wettest portions of their lands to fertile but dry neighboring land areas. As the years went by and more lands were brought into production, the irrigation works became fairly elaborate. By 1922 Gay and Robinson had been to court at least once and had their title confirmed by the territorial courts to a substantial portion of the lands. The lands known as the Ili of Koula were drained by the Koula branch of the Hanapepe River, and from this drainage substantial volumes of irrigation water were diverted into a dry area that was outside the Hanapepe ahupuaa. Similar diversions of water to dry land were being made contemporaneously by Gay and Robinson from their nearby lands in the Ili of Manuahi, the other principal branch feeding the Hanapepe River. This state of affairs had evolved gradually over the years, beginning before 1891, and has been in effect more or less continually until the present time.

In the 1920's the territorial government's increasing interest in water for the development of dry lands at lower elevations, some of which were owned or controlled by the Territory of Hawaii, produced litigation which in 1931 resulted in a decree of the Territorial Court. The Territorial Court held that Gay and Robinson were the owners of "normal surplus" water flowing from their Ilis of Koula and Manuahi into the Hanapepe River, and confirmed their right to divert that water for use outside the Hanapepe drainage. *Territory v. Gay,* 31 Hawaii 376, 387-88 (1930), *aff'd,* 52 F.2d 356 (9th Cir.), *cert. denied,* 284 U.S. 677, 52 S.Ct. 131, 76 L.Ed. 572 (1931) (*Territory I*).

In 1941 the Olokele Sugar Company succeeded to certain lands that were being supplied with irrigation water from the Gay and Robinson engineering efforts, and in 1949 the Gay and Robinson successors opened a new tunnel to supply water to their own and Olokele lands known locally as the Makaweli district.

The Hawaiian Statehood Act, Pub.L. No. 86-3, 73 Stat. 4, *reprinted in* 1959 U.S. Code Cong. & Ad.News 5, *inter alia,* confirmed existing statutory law of the territory and approved the new state's constitution. Gay and Robinson claim that the state constitution includes protection of their court-decreed and vested right to divert and use water from their mauka lands drained by the Koula and Manuahi branches of the Hanapepe.[1] The state officials, however, argue as if the matter were open for a fresh decision, that the private use outside the ahupuaa of a large volume of Hanapepe water by Gay and Robinson and their associates is both undesirable and contrary to state law.

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[1] Hawaii Const. art. XVIII, § 9, *reprinted* in 1 Hawaii Rev.Stat. (1968, Supp. 1983) provides:

> Except as otherwise provided by amendments to this constitution, all existing . . . judgments, . . . orders, decrees, . . . titles and rights shall continue unaffected notwithstanding the taking effect of the amendments. . . .

In 1959 the McBryde Sugar Company commenced in the new state court an action against a number of defendants, among whom Gay and Robinson were named. McBryde sued the state, Olokele, Gay and Robinson, and others referred to as the "small owners" to obtain a declaration of the rights of various parties along the Hanapepe upstream and downstream to various water rights, appurtenant, prescriptive, "ancient," or otherwise derived. The Hawaii state trial court in 1968 declared in a 65-page decision the rights of the parties including "other" small holders whose "ancient" and "appurtenant" rights were acknowledged by the principal parties in the controversy. *McBryde Sugar Co. v. Robinson*, S.P. No. 108 (5th Cir.Ct. of Hawaii, Dec. 10, 1968). Both the state and the larger owners appealed to the Supreme Court of Hawaii, challenging various portions of the trial court's decree. No party questioned existing Hawaii water law as announced in a number of earlier territorial cases.

The Supreme Court of Hawaii in 1973 *sua sponte* overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights. *McBryde Sugar Co. v. Robinson, et al.*, 54 Hawaii 174, 504 P.2d 1330, 1344 (1973). In this decision, which we will refer to as *McBryde I*, the court also held *sua sponte* that there was no such legal category as "normal daily surplus water" and declared that the state, as sovereign, owned and had the exclusive right to control the flow of the Hanapepe River. *Id.* 504 P.2d at 1345. *McBryde I* further announced that because the flow of the Hanapepe was the sovereign property of the State of Hawaii, McBryde's claim of a prescriptive right to divert water could not be sustained against the state. *Id.*

The parties adversely affected by the holding in *McBryde I* petitioned for rehearing and the state supreme court allowed a rehearing on the limited issue of the proper construction of Hawaii Rev.Stat. § 7-1 (a century-old territorial statute dealing largely with drinking water and rights of way on roads over private lands) and the meaning of the word "appurtenant". The parties attempted to enlarge the scope of the rehearing to include state and federal constitutional claims but their attempt was summarily rejected. *See Robinson v. Ariyoshi*, 441 F.Supp. 559, 564 (D. Hawaii 1977) (*Robinson I*). Rehearing was denied in *McBryde Sugar Co. v. Robinson*, 55 Hawaii 260, 517 P.2d 26 (1973) (*McBryde II*).[2] In due course the Supreme Court of the United States denied review, *McBryde Sugar Co. v. Hawaii*, 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135 (1974) (*McBryde III*), and in 1974 this litigation began in the United States District Court for the District of Hawaii. The decision in the district court permanently enjoined the named state officials from enforcing against these plaintiffs any "new law" announced in *McBryde I* and *II*. *Robinson I*, 441 F.Supp. at 586.

The leisurely pace of this litigation has produced three oral arguments in this court, two of which were followed by referral of certified questions to the Supreme Court of Hawaii. *See Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982) (*Robinson II*). Following the publication of the state court's answers to the certified questions, the parties briefed the remaining issues that had been narrowed by the earlier proceedings and reargued the case. A number of complex questions remain, but to expedite the matter we will discuss only those essential to a resolution of the main question: Can the state, by a judicial decision which creates a major change in property law, divest property interests?

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[2] The "opinion" in *McBryde II*, apart from formal recitals consists of the following:

> Arguments of the parties were heard at the hearing had on September 18, 1973. After careful consideration of the briefs and arguments presented at the hearing, we find no reason to change the decision filed herein.

The citation to *McBryde II* is noteworthy, however, for the scholarly dissent of Levinson, J., whose historical research provides valuable background and whose reasoning was substantially followed by the district court.

### Jurisdiction

Before we can address that constitutional question (tendered by the § 1983 claims in this case), we must first dispose of preliminary questions concerning our jurisdiction. The state officials argue: (1) there is no case or controversy because no state officer has made any demand upon the plaintiffs to remove or to cease using their water diversion works; and (2) the plaintiffs' property rights are defined by state law and the state courts have defined those rights. The state officials argue that any federal question that may have remained following *McBryde II* in 1973 has been precluded by the doctrine of *res judicata* at all times after the United States Supreme Court denied both appellate review and certiorari in *McBryde III.*

### Case or Controversy

First, as to case or controversy, we hold that even though the named state officials have not as yet filed actions at law or commenced administrative proceedings against the plaintiffs, the litigation history of the past half century, together with the language of *McBryde I* and *II,* constitutes a sufficient cloud upon the title of the plaintiffs so as to interfere substantially with the financing of improvements or any potential sale of their lands. The dispute constitutes a case or controversy within the meaning of U.S. Const. art. III, § 2. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201 and 2283.

### Res Judicata

With reference to a res judicata bar against these claims, the question becomes more complex. It is settled that "horizontal" appeals will not lie to the United States District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state. *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). *See also District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, 103 S.Ct.

1303, 1314, 75 L.Ed.2d 206 (1983). However, *Rooker* made it clear that the only constitutional questions arising from a state proceeding on which the Supreme Court considered itself to be the final arbiter, were those that "actually arose in the cause" in which a full hearing was held and where the judgment was responsive to the issues. 263 U.S. at 415, 44 S.Ct. at 150. Otherwise, if *Rooker* were a blanket jurisdictional bar precluding the litigation of claims even if there had been no actual state court opportunity to litigate them, *Rooker* would swallow the "full and fair opportunity to litigate" limitation to res judicata clearly established elsewhere by the Supreme Court. *See e.g., Allen v. McCurry,* 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

Consistent with that analysis, we have read *Rooker* not as a jurisdictional barrier but as an application of res judicata. *See e.g., Williams v. Washington,* 554 F.2d 369, 371 (9th Cir.1977); *Hutcherson v. Lehtin,* 485 F.2d 567, 569 (9th Cir.1973); *Francisco Enterprises, Inc. v. Kirby,* 482 F.2d 481, 485 (9th Cir.1973), *cert. denied,* 415 U.S. 916, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974). The Supreme Court, in one of two majority opinions which cited *Rooker* did so in a discussion of res judicata. *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 282-83, 66 S.Ct. 1105, 1109-10, 90 L.Ed. 1230 (1946). The other, more recent, Supreme Court majority citation of *Rooker* has been in a jurisdiction context, with acknowledgment of the res judicata implications. *Feldman,* 460 U.S. at 476, 103 S.Ct. at 1311. In *Feldman,* the Supreme Court held that where allegations underlying a state's highest court's final judicial decision are "inextricably intertwined" with issues presented to a federal court, the federal court has no jurisdiction over those issues, even if those challenges included constitutional claims. *Id.* at 486, 103 S.Ct. at 1316-17.

Faced with the task of deciding our power to review constitutional issues which arise from a state court proceeding, we view the res judicata requirement of full and fair opportunity to litigate, and the *Feldman* "inextricably intertwined" barrier to federal jurisdiction as two sides of the same coin. Under the rubric of either "jurisdiction" or "res judicata," the crux of the question is whether there has already been actual consideration of and a decision on the issue presented. If consideration and decision have been accomplished, action in federal court is an impermissible "appeal" from the state court decision. *See Reynolds v. Georgia*, 640 F.2d 702, 705-06 n. 2 (5th Cir.) *cert. denied*, 454 U.S. 865, 102 S.Ct. 326, 70 L.Ed.2d 165 (1981). If no consideration has been given, or any decision on the matter is ambiguous, it is unlikely that the issues presented to the state high court and to the federal court are so "inextricably intertwined" that the federal court cannot take jurisdiction. Nor is it likely that there will have been a full enough and fair enough opportunity for litigation to warrant the claim preclusive effect of res judicata.

Proceeding under the doctrinal umbrella of res judicata, we find that Robinson's due process claims were not and could not have been litigated in the *McBryde* state proceedings because the Hawaii Supreme Court refused to consider Robinson's federal claims. *Robinson I*, 441 F.Supp. at 564. In *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983), the Supreme Court noted that in a § 1983 action, collateral estoppel effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights. We do not hesitate to apply the same caveat in this res judicata context. The principle is fully consonant with the philosophy expressed in the Restatement of Judgments which provides for an exception to the general rule of preclusion where "[a] new determination of the issue is warranted by differences in quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them." *Restatement (Second) of Judgments* § 28(3).

Turning to application of the *Feldman* doctrine, we cannot see how federal constitutional issues which the state court refused to consider on a petition for rehearing are at all, let alone inextricably, intertwined with a previously reached state court judgment on riparian rights. The Hawaii Supreme Court decision to deny rehearing of the substantive questions of state law may or may not have been intertwined with its decision only to deny hearing of federal constitutional claims. We are not asked to decide whether the composite denial of rehearing and refusal to hear was correct; the Supreme Court has already declined to review the matter. *McBryde III,* 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135. We are asked to review district court findings about constitutional claims which themselves were never decided by a state court, intertwined or otherwise.[3]

Thus we are in no danger of serving impermissibly in an appellate role vis-a-vis the Hawaii state court, or of reopening matters which have been litigated and decided in state court. Where a state court has refused to entertain federal constitutional claims, a federal court violates the precepts of neither subject matter jurisdiction nor res judicata by hearing those claims.

### Merits

The state conceded at oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.

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[3] If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims. *Wood v. Orange County,* 715 F.2d 1543, 1546-47 (11th Cir. 1983) *cert. denied,* —— U.S. ——, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984). We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation. Like the court in *Wood,* we are concerned that "[s]uch a result might deprive [plaintiffs] of any forum, state or federal, where [they have] a reasonable opportunity to present [their] federal constitutional claims, a result arguably contrary to the requirement of due process." *Id.* at 1547.

The district court's opinion in *Robinson I* makes clear that considerable property interests were at stake. 441 F. Supp. at 572-80. In summary form, the interests affected by *McBryde I* and *II* include:

(1) The water rights which as private property had been bought, sold and leased freely, and which had been the subject of state and local taxation as well as condemnation for ditch rights-of-way;

(2) The expenditures by G & R and Olokele of almost one million dollars in building an extensive water transportation system for irrigation of their sugar lands, lands now potentially destined to become pasture; and

(3) The interests of McBryde Sugar Company, which stands, if its rights are vested, in the same position as Gay and Robinson.

On April 28, 1930, the Supreme Court of the Territory of Hawaii, in litigation between substantially the same parties that are here today, except for the McBryde Sugar Company, held that the common law doctrine of riparian rights was not in force in Hawaii with reference to surplus waters of the normal flow of a stream. The same court further held that the owner (konohiki) of the land (ili) could use the water collected on his ili as he saw fit, subject to the rights of downstream owners to drinking water and other domestic uses that the parties in all this litigation have agreed have not been in controversy. *Territory I,* 31 Hawaii at 387-88, 395. When that case reached this court, we affirmed in an opinion which stated that the definition of property rights and water rights in light of the feudal history of land tenure in the islands was best left to the local courts. *Territory of Hawaii v. Gay,* 52 F.2d 356, 359

(9th Cir.1931) (*Territory II*). The water law, at least between the territorial government and the Gay and Robinson interests, thereafter remained settled until statehood.

Relying upon the decrees in *Territory I and II*, Gay and Robinson proceeded with further development of their plantations. By the time this litigation reached the district court, in *Robinson I*, improvements costing many millions of dollars had been constructed on the affected lands. By any reasonable interpretation of the word "vested," Gay and Robinson's rights to the continued use of their water and related engineering works had become vested.

The *Robinson I* court found that McBryde Sugar Company also relied upon the law set forth in *Territory II*, and developed water rights that became vested. (Territorial cases are collected in *Territory I*, 31 Hawaii at 384.) The extent of McBryde's rights, however, the district court left for further litigation in the state courts. 441 F.Supp. at 586-87.

The parties concede that the State of Hawaii has the sovereign power to change its laws from time to time as its legislature may see fit, and may, by changing its laws, radically change the definitions of property rights and the manner in which property rights can be controlled or transferred.

The state may also change its laws by judicial decision as well as by legislative action. Insofar as judicial changes in the law operate prospectively to affect property rights vesting after the law is changed, no specific federal question is presented by the state's choice of implement in changing state law. *See Hughes v. Washington*, 389 U.S. 290, 295, 88 S.Ct. 438, 441, 19 L.Ed.2d 530 (1967) (Stewart, J. concurring).

We assume, therefore, for the purposes of this case, that the Supreme Court of Hawaii was acting well within its judicial power under the state constitution when it overruled earlier cases and declared for the first time, after more than a century of a different law, that the common law doctrine of riparian ownership was the law of Hawaii. This declaration of a change in the water law of Hawaii may be effective with respect to real property rights created in Hawaii after the *McBryde I* decision became final. New law, however, cannot divest rights that were vested before the court announced the new law. *See Hughes,* 389 U.S. at 295-98, 88 S.Ct. at 441-43.

There is no constitutional barrier to the state's exercise of its power of eminent domain to condemn and take vested property rights for public purposes. *See Hawaii Housing Authority v. Midkiff,* —— U.S. ——, 104 S.Ct. 2321, 2330, 81 L.Ed.2d 186 (1984). ("Redistribution of fees simple [can be] a rational exercise of the eminent domain power.") The state has the power to take over the water works constructed by Gay and Robinson and their associates upon exercising the powers of eminent domain in a manner compatible with the Fourteenth Amendment. *See Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

In light of the above authorities, the plaintiffs in this case, having acquired through judicial process a *de jure* vested right to divert water from their lands within the Hanapepe watershed to their own or related lands outside the watershed, *Territory I,* 31 Hawaii at 386, cannot now be divested of this right without just compensation.

It has been clear since *Territory I* that the downstream rights of small owners to domestic water and "ancient" rights to water for taro cultivation on lands that were wet lands before the litigation commenced have never been contested by Gay and Robinson. These rights were specifically left open by the trial court in the first territoral litigation arising out of the earliest diversions of water. The rights of the small holders that were declared in *McBryde I* and *II* were not disturbed in the district court in the case at bar but were left to be sorted out by the state courts consistent with the recognition of any rights that vested before 1973.

As noted, the district court entered a decree granting injunctive relief against named state officials. Because the state officers in these proceedings have taken no steps to interfere with plaintiffs' property, and have denied that they are presently planning to take such steps, the injunction may have been premature. (The officers still argue, however, that the state is free under *McBryde I* and *II*, to take any action it may see fit in the future to control the flow of the river.) A declaration of the rights of the parties would appear to be sufficient to assure the owners of the rights confirmed in *Territory II*. The state must bring condemnation proceedings before it can interfere with vested water rights and the enjoyment of the improvements made in reliance thereon.

The judgment of the district court is affirmed in all respects insofar as it declares the rights of the parties. The injunctions against the named defendants are vacated without prejudice to the continuing jurisdiction of the district court to enjoin future state officeholders from conduct, if any, in violation of the rights of the plaintiffs should such a case arise. The plaintiffs are entitled to costs and such attorneys fees as the district court may determine to be reasonable pursuant to 42 U.S.C. § 1988.

Affirmed in part, vacated in part, and remanded for the entry of a modified judgment.

## APPENDIX B

## OPINION OF THE SUPREME COURT OF HAWAII ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SELWYN A. ROBINSON, *et al., Plaintiffs-Appellees, v.* GEORGE R. ARIYOSHI, Governor, *et al., Defendants-Appellants,* and McBRYDE SUGAR COMPANY, LIMITED, *et al., Defendants-Appellees*

NO. 8241

CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(9TH CIR. NO. 77-2264)

DECEMBER 29, 1982

RICHARDSON, C.J., LUM, NAKAMURA, HAYASHI, JJ., AND RETIRED JUSTICE MENOR, IN PLACE OF PADGETT, J., DISQUALIFIED

### OPINION OF THE COURT BY RICHARDSON, C.J.

Six questions relating to the interpretation and effect of our decision in *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 504 P.2d 1330, *aff'd on rehearing,* 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed for want of jurisdiction and cert. denied,* 417 U.S. 962 (1974) (hereinafter *McBryde*), have been certified to us by the United States Court of Appeals for the Ninth Circuit under rule 20 of this court which permits us to answer state law questions determinative of a cause before the Supreme Court of the United States or any court of appeals of the United States.

The action before the court of appeals serving as the source of the questions involves an attempt by private landowners in the Hanapepe Valley to obtain federal court relief from our decision in *McBryde* delineating rights and interests in and to the waters of the Hanapepe River system. The federal district court sitting in Hawaii, for reasons discussed more fully below, agreed with the landowners that portions of the decision contravened due process. ***Robinson v. Ariyoshi***, 441 F. Supp. 559 (Hawaii 1977). It therefore enjoined the enforcement of parts of the decision it found "untenable and void", *id.* at 586, and returned other portions to a state circuit court for further determination. The State of Hawaii, defendants in the action, then appealed to the Ninth Circuit whence these questions emanated.

### The Course of Litigation

In 1959 McBryde Sugar Company filed a state court action seeking a determination of rights in and to the waters of the Hanapepe River[1] on the island of Kauai, naming Gay & Robinson, Olokele Sugar Company, the State of Hawaii and private owners of small parcels within the ahupuaa of Hanapepe as defendants. Each of the parties owned or utilized parcels of land from which rights and interests in the waters of the Hanapepe could be claimed.

The trial court, after considering extensive argument and evidence, issued a decision awarding quantities of water pursuant to what the court determined to be the parties' appurtenant,[2] prescriptive[3] and surplus[4] water rights. Appeals were filed therefrom to this court by McBryde, Gay & Robinson and the State, each alleging that the trial court had erred in identifying or quantifying the nature or extent of its rights.

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[1] The term "Hanapepe River" includes the Koula and Manuahi Streams which join to make the Hanapepe.

[2] Appurtenant water rights are rights to the use of the quantity of water utilized by parcels of land at the time of its original conversion into fee simple. Peck v. Bailey, 8 Haw. 658 (1867).

[3] "Prescriptive water rights" were thought to be rights acquired by adverse possession.

[4] "Surplus water" represented that amount which remain in a watercourse after the rights of others had been satisfied. *See* question 6, *infra.*

We reversed the trial court in part, for after scrutinizing the foundation and extent of the water rights asserted by the parties, we concluded that the only enforceable private usufructory interests in the waters of the Hanapepe were appurtenant and riparian rights and that the State was the owner of the river's waters. We further ruled that water withdrawn pursuant to either of these private rights could only be utilized on the lands to which the right appertained. We therefore reversed the trial court's award of prescriptive rights and surplus water, and delineated the scope of the remaining private interests.

The private parties subsequently petitioned for a rehearing, averring, *inter alia*, that the decision constituted a "taking" of vested property rights. A rehearing was granted, but after oral argument the original opinion was affirmed. The private parties thereafter sought a review of the decision by the United States Supreme Court which summarily denied the request.[5]

Prior to the denial of review by the Supreme Court, the private parties[6] in *McBryde* initiated the underlying suit in the United States District Court for the District of Hawaii, seeking declaratory and injunctive relief from those parts of *McBryde* relating to the State ownership of water, the transferability of private water entitlements, and the doctrine of riparianism expounded therein. They essentially maintained that our rulings thereon resulted in a "taking" of vested property rights.[7] The district court, though purporting to recognize that "[i]t is axiomatic that the law of real property is left to the states to develop and administer[,]" 441 F. Supp. at 584, granted the requested relief. Relying principally upon Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 294 (1967), where he posited that a "sudden" and "unpredictable" change in state property law converting what had been established as private property into public property constitutes a "taking," the district court found the questioned portions of *McBryde* represented an unjustifiable departure from prior law that took private property for the State.

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[5] The Supreme Court denied review under both its certiorari and appellate jurisdiction. McBryde Sugar Co. v. Hawaii, 417 U.S. 962 (1974).

[6] The suit was initially filed by Robinson designating the State and other private parties as defendants. All private parties however concurred with Robinson and were treated as plaintiffs by the federal district court.

Upon the appeal of the decision to the Ninth Circuit, the following questions were certified to this court regarding the effect to be given *McBryde* in the courts of this state, the effect to be given a previous case involving the water rights of Gay & Robinson and the State, *Territory v. Gay*, 31 Haw. 376 (1930), *aff'd* 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931), and the status of surplus water law under Hawaii law prior to *McBryde*.

### The Certified Questions

The questions certified for reply are:

> (1) May any Hawaii state official execute on the judgment entered in *McBryde Sugar Co. v. Robinson*, *supra*, to enjoin Robinson, McBryde, Olokele, or the Small Owners from diverting water from the Hanapepe or Koula watersheds?
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> (2) May the State of Hawaii claim collateral estoppel or bar and merger effect from *McBryde Sugar Co. v. Robinson*, *supra*, if the state brings an action either

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[7] Procedural due process violations were also alleged. The district court appeared to concur with the allegations but did not rest its judgment on that ground. Robinson v. Ariyoshi, *supra*, 441 F. Supp. at 580.

to quiet title to the water of the Hanapepe or to enjoin the diversion of water from the Hanapepe?

(3) Do the rulings in *McBryde,* with respect to water ownership and water diversion have binding precedential effect on the Hawaii state courts?

(4) Does *Territory v. Gay,* 31 Haw. 376 (1930) (Gay II), *aff'd,* 52 F.2d 356 (9th Cir.), *cert. denied,* 284 U.S. 677 (1931), preclude the State of Hawaii from bringing an action against Robinson, Olokele, McBryde, or the Small Owners to enjoin them from diverting water from the Koula or Hanapepe watersheds?

(5) Does *McBryde, supra,* preclude any or all of the appellees from bringing an action in state court alleging that their property was taken without compensation in violation of the Fifth Amendment to the United States Constitution?

(6) Until *McBryde, supra,* was decided, had the issue of who owned surplus water been a settled question in Hawaii law?

> QUESTION 1: May any Hawaii state official execute on the judgment entered in *McBryde Sugar Co. v. Robinson, supra,* to enjoin Robinson, McBryde, Olokele, or the Small Owners from diverting water from Hanapepe or Koula watersheds?

The jurisdiction of our courts to determine water rights in *McBryde* was found in Part III of Chapter 234, R.L.H. 1955. Section 234-33 thereof sets forth the permissible nature and scope of a judgment by a state court in cases involving water rights. It provides in relevant part that the court

> shall give such decision as may in each particular case appear to be in conformity with vested rights and *shall be just and equitable between the parties.* [I]f on a water right [the decision] *shall state* the proportion of time for use, *and any other things necessary to the right.* It may also regulate the methods by which

> water may be obtained, and by which its supply can be controlled. (Emphasis added).

Thus under this statute, it is the prerogative and duty of a court not merely to apportion the waters of a watercourse but to define the scope of identified rights and insure the equitability of the effect of its determinations.

The trial court in *McBryde* did little more than identify the respective quantities of water to which each party was entitled by virtue of its reputed appurtenant, prescriptive or surplus water rights. However, the pertinent statute empowered the court to further delineate the scope of the water rights identified. The supreme court in its opinion exercised this statutorily granted prerogative regarding the transport of water.

Thus in *McBryde* we held that

> the *right* to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant . . . .

54 Haw. at 191, 504 P.2d at 1341, and that a "riparian right appertains only to land adjoining a natural watercourse for its use." 54 Haw. at 198, 504 P.2d at 1344. But we did not actually enjoin or explicitly prohibit the diversion of water from the watershed. Rather, we sought only to establish that these private usufructory interests were not so broad as to include any inherent enforceable right to transmit water beyond the lands to which such private interests appertained.

We did not say that such transfers are prohibited as a matter of law, for *McBryde* did not discuss and therefore cannot be understood to be conclusive of the circumstances under which a private party or the State could obtain injunctive relief against unsanctioned transfers. And, even in circumstances where some relief would be appropriate, the issuance of any injunction would of course be subject to all of the considerations that serve to limit equitable relief. These limiting doctrines include estoppel, laches, and most particularly with respect to wrongful diversion of water, the public use doctrine as applied to our own unique situation. *See, Reppun v. Board of Water Supply,* 65 Haw. 531, 656 P.2d 57 (1982) .

Thus we take issue with the federal district court's characterization of *McBryde* as "restraining the free diversion of surface waters for use outside the lands of the plaintiffs to which they are appurtenant." *Robinson v. Ariyoshi, supra,* 441 F. Supp. at 586. *McBryde* merely established that there was no *right* on the part of the plaintiffs to benefit from such diversions. But, as was the case in our pre-existing law governing the transport of water,[*] diver-

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[*] Hawaii's law governing the transfer of water prior to *McBryde, supra,* did not provide private possessors of water rights with an absolute right to transfer water away from the land to which that right appertained. Rather, a change in any aspect of the utilization of a private water right has always been understood as dependent upon such a change not injuriously affecting the rights of others. This rule applied not only to the location to which the water was applied, Peck v. Bailey, 8 Haw. 658, 673 (1867), and use to which the water was put, *id.*, but also to any change in the point of a diversion, Carter v. Territory, 24 Haw. 47, 69 (1917), or method by which water was diverted, *id.*

The rights of others which were to be respected were not limited simply to a specified quantity of water. Instead, the scope and nature of such rights also included interests in the means of any diversion and the purposes to which the water was applied. *See, e.g.*, Kahookiekie v. Keanini, 8 Haw. 310 (1891) (diversion of spring enjoined even if landowner were entitled to specified quantity of water because reduction in stream flow would affect the condition of a lower auwai). Any alteration in the use of a water right was therefore wholly dependent upon the surrounding circumstances.

The burden of demonstrating that any transfer of water was not injurious to the rights of others rested wholly upon those seeking the transfer. Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 694 (1904). Thus, in order to obtain any ultimate judicial sanction to a transfer of water away from the lands sions will be restrained only after a careful assessment of the interests and circumstances involved indicates a need for restraint. A delineation of these interests and circumstances were not before us in *McBryde* and we did not order the cessation of any diversions. Consistently with our statutory prerogative, we merely defined the appropriate scope of the rights established in the case and left the actual enforcement of these limitations to appropriate subsequent actions brought by the parties, including the State.

> QUESTION 2: May the State of Hawaii claim collateral estoppel or bar and merger effect from *McBryde Sugar Co. v. Robinson, supra,* if the state brings an action either to quiet title to the water of the Hanapepe or to enjoin the diversion of water from the Hanapepe?

### I.

We initially consider the question of the preclusive effect of *McBryde* should the State bring an action to quiet title to the waters of the Hanapepe. We think the answer here is simple: under our correlative system of water rights, an action to quiet title is not an appropriate means to adjudicate controversies over the corpus of the water itself.

Our quiet title statute provides:

> Action may be brought by any person against another person who claims, or who may claim adversely to the plaintiff, an *estate or interest in real property,* for the purpose of determining the adverse claim.

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of ancient application, a holder of a water right would have to 1) have defined all the potentially affected interests in a watercourse, and 2) have demonstrated that no aspect of these rights would be detrimentally affected. As long as there remained undefined or potentially affected interests in a watercourse no transfer of water could therefore be secure. It is therefore difficult to speak of there having existed an enforceable right to transfer water from the lands to which water rights attached.

HRS § 669-1(a) (1976) (emphasis added). It has essentially remained in its original form since its enactment in 1890, L. 1890 ch. 18, when its purpose was stated as follows:

> The main object of the Bill is the determination of shares in real property, and the rights of the petitioner, and granting authority to one who possesses a right in certain property which is in dispute, to petition the Court . . to hear said petitions, . . . as there is no law which clearly defines petitions of this nature in force at the present time . . . .

Rept. No. 110, Committee on Judiciary, Legislative Assembly (1890). *Accord: Pacific Trust Co. v. Nagamori,* 32 Haw. 323, 331 (1932) ("The statutory action to quiet title was intended as one means of establishing and declaring the interests of the parties in the same land.") Since such enactment, we have never sanctioned a use of the statute to quiet title to water per se, though it may be used to quiet title to real property with appurtenant or riparian water rights. Absent legislative charge, we will continue to adhere to the foregoing view.

## II.

We turn now to the issue of preclusive effect of *McBryde* in an action by the State to enjoin the diversion of water from the Hanapepe.

By and large, we have applied traditional notions of res judicata when confronted with questions regarding the degree to which a prior judgment should be binding in a subsequent action. We have thereby sought to achieve the traditional objectives of that principle, *i.e.:*

> The public interest staunchly permits every litigant to have an opportunity to try his case on the merits; but it also requires that he be limited to one such opportunity. Furthermore, public reliance upon judicial pronouncements requires that what has been finally determined by competent tribunals shall be accepted as un-

> deniable legal truth. Its legal efficacy is not to be undermined.

*Ellis v. Crockett*, 51 Haw. 45, 56, 451 P.2d 814, 822 (1969). The objectives of res judicata and the framework used to attain these aims apply to water rights controversies just as they do to other actions. And we have not hesitated to apply principles of res judicata to water actions very similar to *McBryde*. *See, e.g.*, Palolo Land and Improvement Co. v. Wong Quai, 15 Haw. 554 (1904); *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50 (1902); and *Un Wo Sang Co. v. Alo*, 7 Haw. 661 (1889).

However, *McBryde* in its current posture has no bar and merger effect, and issue preclusion would be confined to the quantification of appurtenant water rights. For the record does not reflect any final judgment in the case, as

> [f]inality [for bar and merger purposes] will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or . . . the amount of damages, or the form or scope of other relief, remains to be determined.

*Restatement (Second) of Judgments*, § 13 comment b (1982).

*McBryde* began and was treated throughout by the trial court as an action to determine the rights of the parties to the waters of the Hanapepe. The trial court's judgment identified the quantity of water each party was entitled to by virtue of its ostensible appurtenant, prescriptive and surplus water rights. This delineation apparently was an exhaustive division of all of the river's waters. On appeal this court affirmed in part the award of appurtenant water rights and reversed the trial court's award of prescriptive and surplus waters. We also confirmed the existence of riparian rights, delineated limitations on the right to transport appurtenant and riparian waters, and found that the State was the owner of surplus water. But no specific instruction was imparted to the trial court, and this court did not utilize its power to render a final judgment. Our judgment on appeal only provided that the trial court's judgment was "affirmed in part; reversed in part." 54 Haw. at 200, 504 P.2d at 1346.

A simple reversal of part of a judgment without further instruction renders that part void, as if it had never been entered. *See O'Brien v. Great Northern R. Co.*, 148 Mont. 429, 421 P.2d 710 (1966), *cert. denied*, 387 U.S. 920 (1966); *Bock v. Bock*, 311 So.2d 684 (Fla. 1975). Since the appellate reversal provided no instruction to the contrary, the *McBryde* judgment after appeal was only a partial quantification of the parties' appurtenant water rights. No other final determination with res judicata effect remained. *Cf. Int'l Telephone and Telegraph Corp. v. General Telephone and Electronics Corp.*, 527 F.2d 1162 (4th Cir. 1976) (final judgment lacking after partial reversal which necessitated further action).

This, of course, is not to say that the determination of rights rendered in the court's judgment was without effect. Upon continuation of the case at the trial level such determination would constitute the "law of the case" and would serve as the foundation for any further action.* But it would not necessarily be completely dispositive of such an action. For McBryde necessarily left unresolved factual and legal issues that would require a determination by a trial court prior to any final judgment respecting the distribution of the waters of the Hanapepe. These include the identification of riparian lands to which such rights attach and most significantly the nature and scope of any remedies to be afforded the parties. Unless and until such findings and conclusions are made and the process finally concluded, *McBryde* can have no res judicata effect except as to that part of the judgment which was not disturbed on appeal.

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* *See* Glover v. Fong, 42 Haw. 560, 578 (1958):

> The doctrine of the law of the case is akin to res judicata but is more limited in its application. It relates solely to questions of law and is confined in its operation to subsequent proceedings in the same case. [Citation omitted.] The doctrine is that a determination of a question of law made by an appellate court in the course of an action becomes "the law of the case" and may not be disputed by a reopening of the question at a later stage of the litigation. It normally commands adherence but is not subject to the inflexibility of res judicata.

QUESTION 3: Do the rulings in *McBryde*, with respect to water ownership and water diversion have binding precedtial effect on the Hawaii state courts?

Just as we are in agreement with the general principles of res judicata, so do we concur in the application of stare decisis:

> "Under the rule of *stare decisis*, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment." [Citation omitted].

*Kapiolani Estate v. Atcherley*, 21 Haw. 441, 454 (1913). *Accord: The King v. Robertson*, 6 Haw. 718, 725 (1889) ("The law of this country is found in our enacted statutes, and in the precedents established by decisions of our Supreme Court . . . ."); *Estate of Allen*, 35 Haw. 501, 515 (1940); and *Kamau & Cushnie v. County of Hawaii*, 41 Haw. 527, 550 (1957) ("'*Stare decisis* is primarily a doctrine by which a Supreme Court keeps the other courts of a judicial system in line . . . . [citation omitted]'")[10]

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[10] We also recognize that stare decisis acts not just to require obedience by inferior tribunals to the decisions of superior courts, but also as a principle of self-restraint on courts with respect to the overruling of prior decisions. We apply stare decisis in this respect with a view toward

> the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with

We have also noted that an inferior tribunal might not be bound under the doctrine of stare decisis if the pronouncement of a superior court is actually dictum. *In re Sherretz,* 39 Haw. 431, 437 (1952).[11] But much earlier, we questioned the wisdom of a rule that accords a statement of a superior court no precedential weight merely because

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> assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Yet, we have also concurred with Mr. Justice Frankfurter, writing for the Court in Helvering v. Hallock, 309 U.S. 106, 119 (1940), that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . ." McBryde Sugar Co. v. Robinson, *supra*, 54 Haw. at 180, 504 P.2d at 1335 (1973). Thus, we have stated:

> This court, like the United States Supreme Court, has "rejected a doctrine of disability at self-correction." *Helvering v. Hallock, supra* at 121. We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is considered manifest justice. [Footnote omitted.] In other words, there is no necessity or sound legal reason to perpetuate an error under the doctrine of state decisis. Of course, on the other hand, we should not change a case law just for the sake of a change.

*Id.*

[11] "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." [Citations omitted.]

Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 103 (1937).

the statement was not necessary to the actual adjudication of the controversy:

> But perhaps as important a question as that of whether an opinion is a decision or a *dictum* is that of the weight to be given to it if it is a *dictum*. To hold that an opinion is a *dictum* is not equivalent to holding either that the court in the particular case acted unwisely in giving it or that no respect should be shown it. There are all shades. Even an actual decision may be reversed if clearly erroneous. An opinion expressed after full argument and due consideration upon a doubtful point closely connected with, or apparently though not necessarily involved in a case, should perhaps, on principle, be given greater weight than an actual decision rendered upon little argument and consideration. It should at least be given greater weight than an opinion expressed merely by the way. . . . There is no doubt a greater tendency now than there was formerly to pass upon questions presented but not necessary to be decided, and doubtless courts often go too far in that direction. Just how far they should go in any particular case depends largely upon the circumstances of that case. . . . Perhaps the strongest reason that can be urged in support of the course pursued [here] is, that the case was to go back to the Circuit Court for further action and that that court would naturally want instructions upon the point in question and that, if such instructions were not given, the case would probably be brought to this court again for the settlement of the question. Under such circumstances, with a view to settling the law of the case once for all, the court would often be justified in going further than it would under some other circumstances.

*Nobrega v. Nobrega,* 14 Haw. 152, 153-54 (1902). Thus, we think a more constructve approach would be to consider a statement of a superior court binding on inferior tribunals, even though technically dictum, where it "was passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, and the opinion was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended." *Id.* at 155.[13]

Having expressed these views, we turn to the particular question propounded for our response. We conclude that the doctrine of stare decisis will generally apply with respect to the effect to be given *McBryde* by the courts of this jurisdiction. Thus, all conclusions in that case necessary to adjudicate the controversy are binding on state courts. We do not reach the question of whether such conclusions include those respecting water ownership and diversion; we think it clear that even if this were not the case, those decisions should, under the test we set forth in the preceding paragraph, be accorded binding precedential effect.

In sum, we answer question 3 affirmatively. The rulings in *McBryde* with respect to water ownership and water diversion have binding effect in the state courts of Hawaii.

> QUESTION 4: Does *Territory v. Gay,* 31 Haw. 376 (1930) (Gay II), *aff'd* 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931), preclude the State of Hawaii from bringing an action against Robinson, Olokele, McBryde, or the Small Owners, to enjoin them from diverting water from the Koula or Hanapepe watersheds?

*Gay II* was a suit in equity brought in 1928 by the Territory of Hawaii, the owner of the ahupuaa or Hanapepe, against Gay & Robinson, the owner of the independent ilis kupono of Koula and Manuahi which are located entirely within the ahupuaa of Hanapepe, and Hawaiian Sugar Co., Ltd., a lessee of Gay & Robinson.

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[13] *Cf.* United States v. Kahn, 251 F. Supp. 702, 708 (S.D.N.Y. 1966), *aff'd*, 366 F.2d 259 (2nd Cir. 1966), *cert. denied*, 385 U.S. 948 (1966) (where there is no other authority on point, a district court is obliged to follow a pronouncement of the Supreme Court, even though it is a dictum).

Pursuant to a lease agreement with Gay & Robinson, Hawaiian Sugar diverted waters originating in Koula from the Koula-Manuahi-Hanapepe watershed for use elsewhere. The waters would otherwise have flowed out of Koula and Manuahi and have been available for downstream use by the Territory.

The Territory wanted the use of this water and filed a bill in equity, asserting ownership of all "surplus" waters arising in the ahupuaa of Hanapepe, including such "surplus" waters as originated on the upstream lands of Gay & Robinson. It prayed for "an injunction restraining . . . [Gay & Robinson and Hawaiian Sugar from illegally diverting water from said Hanapepe River . . . [a]nd for such other and further relief . . . [as might be appropriate]." Gay & Robinson's response was that it owned the "surplus" waters originating in Koula and Manuahi and was thus free to allow Hawaiian Sugar's diversion thereof.

In its decree, the trial court first noted it had "consented to hear this cause on the condition that the issue be confined to the sole question of title to the normal daily surplus of waters arising and flowing in . . . [that portion of the ahupuaa of Hanapepe consisting of Gay & Robinson's ilis kupono of Koula and Manuahi]." Later in the decree it reiterated the foregoing by stating: "The only question which this Court will attempt to decide is the right of the respondents to continue to maintain the diversion of a part or *all* of the normal daily surplus of waters arising . . . [in Koula and Manuahi]." Its conclusion was:

> This Court, therefore, holds that the respondents at bar are legally entitled, by reason of their fee simple ownership of the sources of the water supply arising in the ilis of Manuahi and Koula, to divert and use as their own, all the normal, daily surplus of waters

> of the Koula Stream, so long as this diversion under that claim of ownership does not interfere with the established prescriptive rights of lower landowners in Hanapepe Valley for domestic uses and for wet agricultural use.

Therefore the injunctive remedy sought by the Territory was denied.

The Territory appealed the decision, and our predecessors affirmed the trial court, apparently on the primary basis that owners of ilis kupono, not encompassing ahupuaas, were entitled to normal daily surplus waters arising in the ilis.

In considering the scope of *Gay II's* res judicata effect, we first note we have not approved the application of the doctrine of merger and bar by a non-party to a prior action against a party thereto, though we have sanctioned the defensive use of collateral estoppel by a non-party. Thus, the non-parties to *Gay II,* including Olokele, McBryde and the small owners (assuming none was in privity with the *Gay II* parties), could not argue claim preclusion against the State in a state action to enjoin the diversion of water from the Koula or Hanapepe watersheds.

Second and more importantly, we do not view the action in *Gay II* as one to enjoin a wrongful diversion of water *out of* the Manuahi-Koula-Hanapepe watershed. Rather, the record is clear that the Territory sought to enjoin an allegedly illegal and injurious diminution in streamflow. The case was not concerned with the propriety of extra-watershed transfers; that the court's decree had an effect of stopping such diversions was only incidental to the primary subject matter of the suit. Thus, even as between the parties to *Gay II,* no claim preclusion will arise from that adjudication to prevent a state action to enjoin such extra-watershed transfers.

Thus, we answer the question primarily in the negative: *Gay II* will not have merger and bar effect against the State in a subsequent suit to enjoin the diversion of water from the Koula or Hanapepe watersheds (a) except as between the parties to *Gay II* or their privies, and (b) even as between them, because such a claim would be different from the claim in *Gay II*. Although collateral estoppel may bar some claims, we do not think it necessary to discuss the full scope of its effect now.

QUESTION 5: Does *McBryde, supra*, preclude any or all appellees from bringing an action in state court alleging that their property was taken without compensation in violation of the Fifth Amendment of the United States Constitution?

We are assuming the action referred to would be similar to the one brought in *Robinson* which alleged that enforcement of significant portions of the *McBryde* decision should be enjoined and parts of the opinion declared a "nullity" on grounds that the decision took" vested property.

State judicial action may, of course, constitute state action violative of the Fourteenth Amendment of the United States Constitution. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Inasmuch as the Fifth Amendment limitation on governmental takings has been extended to the states via the Fourteenth Amendment, a judicial determination could arguably constitute a taking of private property without just compensation. *Hughes v. Washington*, 389 U.S. 290, 294 (1967) (Stewart, J., concurring). The issue we now address is whether or in what circumstances a purported judicial taking by way of a decision of our state supreme court can serve as a basis for subsequent action in our state courts.[12]

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[12] Appellees also raise the issue of sovereign immunity. The State may, of course, only be sued pursuant to a waiver of its immunity. Big Island Small Ranchers Ass'n v. State, 60 Haw. 228, 588 P.2d 430 (1978). And we agree with Appellees that our applicable statutes contain no provision for a suit against the State seeking damages based on any "taking" resulting from the *McBryde* opinion. But "sovereign immunity may not be invoked as a defense

## I.

Due process in its "primary sense" presupposes that one claiming to be injured by violations of the law will be permitted "an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). Thus if persons allegedly wronged by unconstitutional state action are wholly without an effective avenue of recourse, the availability of some forum would be required, notwithstanding any state court determinations on the applicable scope of any doctrine of preclusion. *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464 (1918). But assuming that an adequate opportunity to be heard is provided, such limitations within our state system are wholly a function of state law, *id.* since there is no constitutional obligation to "afford a litigant more than one full and fair opportunity to judicial resolution of the same issue." *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 328 (1971).

Appellees have argued that a subsequent action based on *McBryde* should not be precluded because they had no opportunity to litigate the issue of whether determinations in the opinion constituted a taking. Conversely, the State contends that this issue was actually litigated and decided as part of the appeals process, specifically during the rehearings process before our state supreme court and in Appellees' appeals and petitions for certiorari addressed to the United States Supreme Court. We therefore begin with an inquiry on whether the aforementioned appeals processes afforded Appellees an adequate opportunity to argue the issues which would be raised in a second action.

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by state officials who comprise an executive department of the government when their action is attacked as being unconstitutional." W. H. Greenwell, Ltd. v. Land Dept., 50 Haw. 207, 209, 436 P.2d 527, 528 (1968). Hence a suit in state court similar to that filed in Robinson v. Ariyoshi, *supra*, seeking to enjoin an unconstitutional application of *McBryde* by state officials would not be precluded by the doctrine of sovereign immunity.

In the *McBryde appeal*, a rehearing was granted by this court pursuant to timely petitions, motions, and memoranda filed by McBryde, Gay and Robinson, Olokele and the small owners. Among the grounds asserted and discussed were allegations that the court's original opinion violated the petitioners' rights under the federal constitution, including the takings clause of the Fifth Amendment.[14] The petition for rehearing was subsequently granted with further briefing being requested on the interpretation of HRS § 7-1 and the transfer of appurtenant water rights.[15] On September 18, 1973, oral argument was heard pursuant to the petition, with each party permitted one-half hour for argument. While no transcription of the argument was made, the minutes of the court clerk reflect that the takings issue was discussed.[16] The court then considered the arguments presented and affirmed the original *McBryde* judgment in a per curiam opinion. Justice Levinson in his dissenting opinion discussed Appellees' takings argument at length and relied on it as one of the grounds for his dissent.[17] The parties thereafter filed appeals or petitions for certiorari in the United States Supreme Court. The Supreme Court denied the requests for review. 417 U.S. 962 (1974).

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[14] The federal constitutional arguments raised in the petitions for rehearing are summarized in McBryde and Olokele's writ of certiorari before the United States Supreme Court as follows:

> SUBSEQUENT PROCEEDINGS AND REHEARING
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> Timely petitions for rehearing were filed by McBryde and by Gay & Robinson. A "Motion for Partial Vacation of Opinion and for Opportunity to Present Evidence and Argument" was filed by Olokele, its first active appearance in the appeal. The two petitions and the motion contended *inter alia that the court's application of Hawaii Rev. Stat. § 7-1 and the 1847 enactment was unconstitutional since, as construed, they took vested property rights without compensation*, and because the court had construed and applied those provisions without observance of the requirements of procedural due process. Gay & Robinson, a party to the decision in *Territory v. Gay*, and Olokele, whose predecessor in interest was a party in that action, and who, as lessee of Gay & Robinson, is in privity with a party to that action, maintained that the two provisions had been applied in violation of the doctrine of *res judicata*. Olokele specifically claimed that the "doctrine of res judicata . . . is an aspect of [the] basic guaranty of the Due Process Clause." Gay & Robinson also argued that the court's application of its holdings to a party to *Territory v. Gay*, 52 F.2d 356 (1931), *certiorari denied*, 284 U.S. 677 (1931), failed to afford Full Faith and Credit to the Ninth Circuit's decision in that action.

(Footnotes omitted; emphasis added). Writ of certiorari at 13-15.

We agree with the State that these opportunities to present arguments and to potentially prevail in the foregoing judicial proceedings were sufficient to insure Appellees their day in court. Preclusion of further consideration of the takings question arising from the *McBryde* judgment would be neither unfair nor violative of due process.

The rehearings process in this court, of which Appellees availed themselves, provides the parties with an opportunity to challenge errors in the formulation of the court's initial decision in a case. *Godbold v. Manibog*, 36 Haw. 230 (1942). Our rules provide parties with a right to petition for rehearing and requires the stating of the grounds therefor.[18] By this process the court's attention is focused on any alleged infraction, and the decision is reviewed in this light. If the petition is granted, oral argument may be permitted and the earlier opinion may be amended. The petitioners are therefore provided with an opportunity to prevail on the merits of their argument.

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[15] While the briefs on rehearing were limited to these issues, oral argument was not. Moreover, inasmuch as the parties asserted that the interpretation of HRS § 7-1 adopted in the *McBryde* opinion constituted a taking of vested rights, the takings issue could have been and was raised as part of the briefings process. See Supplemental Brief of Small Owners at 23.

[16] Mr. Quinn opened the argument for Olekele [sic] Sugar Co., Ltd. He presented argument on the issues of res judicata and the utilization of the water. He also argued that if an individual [sic] rights are violated the individual should be compensated. He concluded at 10:30 a.m.

[17] 55 Haw. at 298-304, 517 P.2d at 47-50. Justice Levinson joined the majority in the initial *McBryde* opinion. However, after the rehearing he "recant[ed] that position" pursuant to, among other things, "arguments adduced on rehearing". *Id.*, 55 Haw. at 262, 517 P.2d at 27.

Even if the petition for rehearing is denied, the opinions of the United States Supreme Court assure the availability of that body as yet another forum for judicial consideration. For it is a longstanding rule of that court that a federal claim first raised by petition for rehearing in a state court is in time for purposes of review if the occasion for it arose unexpectedly from the grounds of the state court's decision. *Brinkerhoff-Faris Trust, supra; Great Northern Railway Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932): *Herndon v. Georgia*, 295 U.S. 441 (1935). Thus, the arising of a takings issue upon the Hawaii supreme court's initial determination of the *Mc*-

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[18] Supreme Court Rule 5, as in effect at the time of the *McBryde* petitions, provided as follows:

RULE 5. REHEARING

(a) *Time and Form.* A petition for rehearing may be presented only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a justice. The petition shall briefly and distinctly state its grounds and shall include points and authorities relied on in support thereof and shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay.

(b) *Argument; Reply; Allowance.* No reply to a petition for rehearing will be received unless requested by the court or by a justice who concurred in the opinion or ruling and no petition for rehearing will be granted in the absence of such a request. There shall be no oral argument on a petition for rehearing.

*Bryde* case did not preclude United States Supreme Court review. The choice of the Supreme Court to make available this arena of review is a recognition that the rehearings process available in a state supreme court is a proper means to raise constitutional issues born of that court's determinations and the decision on rehearing represents a final and binding determination by the state court system on the issue raised.

We conclude that the availability of the rehearings process and United States Supreme Court review of constitutional violations allegedly created by a state supreme court decision provides aggrieved persons with adequate opportunity to have their arguments considered and to prevail on the merits when justified. For while neither forum provides an opportunity for a full trial, consideration of the strength and validity of the arguments are afforded at each level. Requiring the availability of yet another forum would mean that the parties are entitled to two independent opportunities for judicial relief. We perceive no reason to provide them with two complete bites of the apple.

## II.

We now turn to the question of whether an independent action would be precluded under the laws of our state.

Except as provided by statute, the jurisdiction of our circuit courts is strictly original. HRS § 603-21.8, 603-21.9 (1976). And of course, these courts are endowed with no statutory authority to review the decisions of our state supreme court. Thus, if a takings action based on the *McBryde* opinion constitutes an appeal of that opinion, the circuit courts would be without jurisdiction to entertain the suit.

A similar limitation is imposed on the jurisdiction of the federal district courts by *Rooker v. Fidelity Trust*, 263 U.S. 413 (1923), where the Supreme Court stated:

> If the constitutional questions stated in [an action in federal district court] actually arose in [a previous

> action in the state courts] it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. [Citations omitted.] Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [Citations omitted.] To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

*Id.* at 415-16.[19] Thus, under the *Rooker* doctrine there appear to be two relevant inquiries: 1) whether an issue "actually arose" in a previous state court action; and 2) whether a second action is a proceeding to "reverse or modify the judgment." If both inquiries are answered in the affirmative then the second action would constitute a prohibited appeal. The relevant inquiries within our state system would be the same.

As we have seen, the issue of whether the judgment and delineation of rights posited in *McBryde* constituted a taking clearly arose in the process of the *McBryde* appeal.[20]

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[19] *See also* Reynolds v. Georgia, 640 F.2d 702 (5th Cir. 1981); Buck v. Ohio Court of Appeals, 554 F.2d 766 (6th Cir. 1977); Smiley v. South Dakota, 551 F.2d 774 (8th cir. 1977).

[20] *Cf.* Buck v. Ohio Court of Appeals, *supra* (sua sponte reversal of the trial court by the court of appeals based on a statute which both parties agreed was not relevant to the case was not, pursuant to the *Rooker* doctrine, properly the basis for a procedural due process claim in federal court where plaintiff's due process claims were denied certiorari by the highest court of the state and no attempt was made to appeal the decision to the United States Supreme Court); Smiley v. South Dakota, 415 F. Supp. 870 (D.S.D.

Thus, any suit to "reverse or modify" the judgment based on these takings issues would be an unauthorized appeal. We understand "reverse or modify" to encompass any relief sought to negate or alter the effect of the judgment based on errors allegedly committed during the preceding judicial process.[21]

That our state supreme court is the final arbiter within our state system of constitutional issues arising in or from a particular case is supported by the fact that the United States Supreme Court is authorized to consider and will consider only final judgments in its review and that the takings issue was presented as part of final judgment before the Supreme Court in the *McBryde* appeal. The Supreme Court has stated the test of finality for the purposes of review is whether the state appeals court "has in fact fully adjudicated rights and that that adjudication *is not subject to further review by a state court.*" *Dept. of Banking v. Pink,* 317 U.S. 264, 268 (1942) (emphasis added). Inasmuch as the Court has entertained and reversed decisions based on constitutional issues that arise from a state supreme court's decision in a case, that is, where the opinion itself is alleged to be violative of the constitution, *see, e.g.,*

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1976), *aff'd,* 551 F.2d 774 (8th cir. 1977) (federal district court, pursuant to *Rooker,* had no jurisdiction to determine whether a trial court's determination of plaintiff's riparian rights constituted a taking when the state supreme court, "fully cognizant of plaintiff's taking claim, affirmed the trial court's decision.")

[21] The precise nature of the relief sought would not be determinative. *Cf.* Paul v. Dade County, 419 F.2d 10, 13 (5th cir. 1969):

> [P]resentation to the federal court of the same constitutional questions already passed upon by the state court is a "form of direct federal district court review of state decisions" even though no declaration of the invalidity of the state judgment was sought as in *Rooker*. . . . [T]he district court is patently without jurisdiction to engage in such a review because that review would be tantamount to an attempt "to reverse or modify" a state judgment which *Rooker* [illegible]

*Brinkerhoff-Faris Trust, supra,* we can only assume that the Court did not foresee either the necessity or availability of further state court action in the matter.[22]

## III.

We believe the same result would follow if relief were sought through a motion for relief from judgment[23] based

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[22] Indeed, Appellees herein, in their original petitions for certiorari before the United States Supreme Court recognized the necessity of the finality of any state judgment brought before that Court and argued accordingly:

> Since the record in this case shows that the judgment of the Hawaii Supreme Court
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> > "has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court"
>
> (Department of Banking v. Pink, 317 U.S. 264, 268 (1942)) and that it concludes the controversy as to all parties (Meagher v. Minnesota Threshing Mfg. Co., 145 U.S. 608, 611 (1892)), the question of the finality of its decision for purposes of invoking this Court's jurisdiction under Section 1257 is not at issue here. See also Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551 (1945); Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69 (1946).

McBryde-Olokele petition for certiorari at 18 n.46.

[23] Hawaii Rules of Civil Procedure 60(b):

> (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void;

on the takings issue. For while unconstitutional judicial conduct may indeed serve as a basis for relief from judgment under the rule, *cf. Isemoto Contracting Co., Ltd. v. Andrade*, 1 Haw. App. 202, 616 P.2d 1022 (1980) (judgment can be vacated as void pursuant to HRCP 60(b)(4) when proceedings were conducted in such an arbitrary or improper manner that the court's action may be said to constitute a denial of due process) (dicta), we believe a trial court has no jurisdiction under the rule to find that our state supreme court erred in determining issues presented to it.

In *Eutectic Corp. v. Metco Inc.*, 597 F.2d 32 (2nd Cir. 1979), the Court of Appeals for the Second Circuit, confronted with an analogous situation under Federal Rule of Civil Procedure 60(b), reached a similar conclusion. There, appellants sought relief from judgment in federal district court on the basis of "mistakes" allegedly committed by the court of appeals in its previous determination of the case. In affirming the district court's denial of

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(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and and bills in the nature of bills of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The rule is identical in substance to the

the motion, the court of appeals held that the district court had no jurisdiction under the rule to provide such relief:

> [T]he rule 60(b) motion to correct the "mistake" is addressed . . . to the judgment of the court of appeals. This judgment, however, is without jurisdiction to alter or set aside. The court of appeals' rulings are the law of the case, and the district court is bound to follow them; it has no jurisdiction to alter or review them. [Citations omitted.]
>
> The proper course for appellants to seek review of the court of appeals' alleged mistake was by writ of certiorari to the Supreme Court. . . . The Rule 60 motion cannot be used as a substitute for appeal. [Citation omitted.]

597 F.2d at 34. This apparently is the general rule. 7 Moore, Federal Practice, 425 (2d ed. 1974).

*McBryde, supra,* thus precludes the bringing of any action in state court which would constitute an appeal of that case either by way of an original action or a motion for relief from judgment.[24]

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[24] Moreover, we are convinced that an action which alleged that all applications of *McBryde* would constitute takings must inevitably fail. For a change in rules of law governing property does not, in itself, provide the basis for an alleged constitutional violation. As stated in Bauman v. Smrha, 145 F. Supp. 617, 625 (D. Kan. 1956), *aff'd per curiam,* 352 U.S. 863 (1963), in which a three-judge district court panel upheld the judicial and statutory abrogation of a pre-existing system of common law water rights.

> There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law.
>
> Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment

## IV.

This, however, does not preclude all original actions relating to Appellees' use of the waters of the Hanapepe. For the preclusive effect of the *McBryde* appeal extends only so far as the issues decided in that case. *Cf. Hicks v. Miranda*, 422 U.S. 332, 345 n.14 (1975) (preclusive effect of Supreme Court dismissal for want of a substantial federal question, while a dismissal on the merits, is limited to issues properly presented and declared to be without merit). And, as we have stated in response to questions 1 and 2, we understand *McBryde* to be silent on the actual application of the rights delineated therein to existing diversions. Thus, we do not understand the opinion to have addressed the question of whether the cessation of any particular diversion would in fact constitute a "taking." An action by Appellees to enjoin the cessation of particular diversions would therefore not be precluded by that decision.

We have not hesitated in other circumstances to prohibit what might be otherwise lawful governmental action in order to prevent "manifest injustice." *Filipo v. Chang*, 62 Haw. 626 (1980) (applying doctrine of equitable estoppel). Whether a similar equitable restraint or the Constitution's prohibition of "taking" vested property interests will preclude the literal application of the rights posited in *McBryde* has yet to be decided.

QUESTION 6: Until *McBryde, supra*, was decided had the question of who owned surplus water been a settled question in Hawaii Law?

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(Footnotes omitted.) Thus, the fact that *McBryde* departed from the parties' understanding of pre-existing common law and may have extinguished theretofore unexercised usufructory rights under that system does not provide a grounds for a takings action. *Cf.* Village of Tequesta v. Jupiter Inlet, 371 S.2d 663 (Fla. 1971); Knight v. Grimes, 127 N.W.2d 708 (S.D. 1964) (upholding constitutionality of change in common law

It is generally recognized that a simple private ownership model of property is conceptually incompatible with the actualities of natural watercourses. Rather, the variable and transient nature of the resource, as well as the necessity of preserving its purity and flow for others who are entitled to its use and enjoyment have led to water rights being uniformly regarded as usufructory and correlative in nature. See, Malony, Ausness & Morris, A Model Water Code, 81 (1972); Trelease, *Government Ownership and Trusteeship of Water*, 45 Cal. L. Rev. 638, 640 (1957).

A part of Hawaii's caselaw, however, appears to have departed from this model by treating "surplus water" as the property of a private individual.[25] We do not believe

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[25] Our reference to "Hawaii's caselaw" governing water is perhaps misleading for the volumes of Hawaii Reports represent four separate political regimes. The first was the period prior to 1893, during which Hawaii was a constitutional monarchy and the justices of the Supreme Court were appointed by the king. In 1893, the monarchy was overthrown and a republican form of government was substituted. During this period, the justices were appointed by that government. In 1897, Hawaii was annexed by the United States and until 1959 was a territory with our judges and justices appointed by the President of the United States with the advice and consent of the United States Senate. In 1959, Hawaii became a state.

The only cases treating "surplus water" as private property are to be found during the territorial period, when the judiciary was not a product of local sovereignty. While the decisions of the territorial courts were unquestionably binding upon the parties before it, we doubt whether those essentially federal courts could be said to have definitively established the common law of what is now a state. So long as the federal government was sovereign its authority to frame the law was unquestionable, but upon our assumption of statehood our own government assumed the whole of that responsibility, absent any explicit federal interest. And it is from our authority as a *state* that our present common law springs:

> "[B]ut law in the sense in which courts speak of it today [, the common law,] does not exist without some definite authority behind it. The common law so far as it is enforced in

the departure represented "settled" law. Instead, as the following review of the relevant caselaw and its impact demonstrates, Hawaii's law regarding surplus water was at the time of *McBryde* in such a state of flux and confusion that it undoubtedly frustrated those who sought to understand and apply it. The difficulty of insuring an equitable distribution of unevenly flowing waters in the face of competing claims and increasing demands made the delineation and application of a simplistic doctrine of ownership well nigh impossible. ***McBryde*** was brought to us for decision in this context.

## I.

Prior to 1848 land and its usufructs within the kingdom of Hawaii were the property of the king. In that year, by what has come to be known as the Great Mahele, the concept of private ownership of land was introduced and

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> a State whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . . [T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own . . . should utter the last word."

*Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

The only statement of our law governing surplus water since statehood is to be found in *McBryde*.

We recognize that HRS § 1-1, which was enacted during the monarchy in 1892 and amended only once, in 1903, might be construed to adopt territorial caselaw as among the "Hawaiian judicial precedent" representing the common law of the State. We do not at this time, however, address the question of whether those cases can truly be considered "Hawaiian" rather than federal precedent for we wish only to point out that the development of the law governing surplus water took place during a period when the resources of our land were subject to an authority which did not directly represent Hawaii's people and that the most recent pronouncements on the subject arise more immediately from the implemented; land traditionally controlled by the king and lesser royalty was granted to them in fee simple upon the satisfaction of certain minimal requirements. Subsequently, commoners and foreigners were granted the right to obtain land in fee. *See generally* Chinen, *The Great Mahele: Hawaii's Land Division of 1848* (1958). Between the time of the Mahele and the turn of the century the courts of the kingdom began to recognize that certain usufructory water rights were also conveyed by the sovereign when lands were transferred into private hands. The principal such interest was an "appurtenant" right to the amount of water utilized on the land at the time of the Mahele. *Peck v. Bailey*, 8 *Haw.* 658 (1867). Also the subject of judicial determinations were so called "prescriptive" rights ostensibly obtained through adverse use of waters for the statutory period of adverse possession necessary for their establishment. *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 651 (1895). But during the period of Hawaii's independence there was no judicial examination of the rights to the remainder of a natural watercourse after the satisfaction of these usufructory rights.

Thus, in 1902 the Territorial Supreme Court in *Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50 (1902), stated the question of rights to such "surplus" had "always [been] recognized as one of great difficulty, and the court has carefully avoided passing upon it until compelled to do so and has always regarded it as an unsettled question." *Id.* at 63. Two years later however, the court appeared to say that surplus waters were, by virtue of Hawaiian tradition, the "property" of the konohiki[36] of the ahupuaa of its origin.[37] *Hawaiian Commercial*

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[36] "Konohiki" traditionally indicated the head man of an ahupuaa land division under a chief. Subsequent to the Mahele it came to be used to indicate the grantee of an ili or ahupuaa and his successors in interest.

[37] The court stated as follows:

Surplus water. This, in our opinion is the property of the *and Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675, 680-81 (1904). But in doing so the court defined surplus water as "water, whether storm water or not, that is not covered by prescriptive rights [or appurtenant rights] *and excluding also riparian rights*, if there are any." *Id.* at 680. By this reference to possible riparian rights, which had been alluded to but never explicitly adopted in this jurisdiction, the court left open the issue of the existence of this form of usufructory right that could only exist in derogation of the notion of surplus water. Thus, while the court may indeed have stated that surplus water was the "property" of the konohiki as between the two parties to that action, its definition of those waters clearly left to the future the development of other interests in water and therefore

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konohiki, to do with as he pleases, and is not appurtenant to any particular portion of the ahupuaa. By ancient Hawaiian custom this was so. Originally the King was the sole owner of the water as he was of the rest of the land and could do with either or both as he pleased. In later years, the rule seems to have been for him not to dispossess tenants of their lands except for cause and to that extent, perhaps, he would not have deprived cultivators of the water to which their lands were by usage entitled. But no limitation, so far as we can learn, ever existed or was supposed to exist to his power to use the surplus waters as he saw fit. There is no reason for supposing that such water was regarded as appurtenant to one portion of the arable land of an ahupuaa and not to another portion or for supposing that it was appurtenant to the arable land and not to the remainder of the ahupuaa. During recent years konohikis have in many instances diverted from the ahupuaa the surplus water either wholly or in large part. An argument based upon public policy or upon the necessity or wisdom of encouraging the cultivation of the soil upon a scale unknown and impossible in ancient times, cannot be of assistance, for a determination that the surplus water belongs, in accordance with ancient Hawaiian custom, to the konohiki is not less in favor of an enlarged measure of cultivation than would be a determination that such water belongs to the present holder of a particular portion of the ahupuaa.

predicated the quantity and very existence of surplus after the satisfaction of those interests.

Thirteen years later in *Carter v. Territory*, 24 Haw. 47 (1917), the court was confronted with the problem of distributing storm waters that swelled a stream beyond its normal flow between two adjoining ahupuaas. Although the rule set forth in *Hawaiian Commercial*, *supra*, apparently required that such "storm and freshet" surplus be awarded to the konohiki of the ahupuaa of its origin, the court did not do so. It held instead that such waters were to be divided in accord with the riparian doctrine.

But thirteen years later our law respecting surplus water was again redefined. *Territory v. Gay*, *supra*, involved the competing rights of the konohiki of an ili kupono on which "normal daily" surplus waters originated and the konohiki of the surrounding ahupuaa. Issues related to the definition or quantification of such normal daily surplus were not implicated because the parties stipulated to the presence of such waters and left open the question of the rights of others. On the single question presented for determination, a divided court held that normal daily surplus "belonged" to the konohiki *of an ili kupono* upon which such waters were generated. The court reached no decision respecting storm and freshet surplus. Chief Justice Perry would have included such waters in normal daily surplus but was unable to convince a majority of the court to do so. Similarly there was no ruling with respect to the rights of others upon which the very existence of surplus water was contingent.

Thus, in the one hundred and twenty-five years between the Mahele and the *McBryde* opinion this court had issued three separate opinions respecting surplus water,[38] with more than a decade between each. Each treated surplus water differently,[29] and in none of them did the court even attempt to clearly define or quantify the nature of this right. Any references to the problem was confined to discussion of the undelineated rights of others to a watercourse.

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[38] Reference to surplus water rights can also be found in Foster v. Waiahole Water Co., 25 Haw. 726 (1921); In re Taxes, Waiahole Water Co., 21 Haw. 679 (1913); Kaneohe Ranch v. Kaneohe Rice Mill Co., 20 Haw. 658 (1911). None of these cases however delineate the nature or scope of the water right.

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[29] The development of the law governing surplus water can be graphically summarized as follows:

| | DEFINITION | | "OWNERSHIP" | |
|---|---|---|---|---|
| *HC&S* (1904) | *all water*, whether storm or not, not covered by prescriptive or riparian rights, if there are any. | | konohiki of ahupuaa of origin | |
| *Carter* (1917) | "normal daily": normal flow exceeding rights of others | "storm and freshet" waters which swell rivers beyond their normal flow | normal daily: konohiki of ahupuaa of origin | storm and freshet divided between ahupuaas in accordance to riparian doctrine |
| *Gay* (1930) | "normal daily" in stipulation of parties with one opinion urging the abandonment of *Carter* distinction between normal and storm and freshet and recognition of domestic appurtenant rights | | konohiki of ahupuaa or ili kupono of origin | |

Thus in the course of three opinions "surplus" water was defined, then redefined after which the redefinition was called into question. In those same opinions all surplus was first given the konohiki of the ahupuaa, then part of the surplus was to be divided pursuant to riparianism, then the part previously reserved to the konohiki of an ahupuaa was deemed to be the property of the konohiki of the ili *or* ahupuaa of origin. We believe that such law could hardly have been considered so settled as to preclude reconsideration.

In our view, the concept of ownership is meaningless without some identification of the thing owned and the rights accompanying such ownership that are also defined and capable of being acted upon. *See generally*, Snare, *The Concept of Property*, 9 Am. Phil. Q. 200 (1972). We do not believe that the concept of surplus water had ever been sufficiently delineated so that the ownership of such water could be considered settled to a point where further development of the doctrine was precluded.

Surplus water, as discussed in our cases, did not present a right to a fixed quantity of water; it was the residuum of the water in a natural watercourse after the rights of others had been accounted for. Thus until every other interest in a watercourse had been identified and quantified, there could be no actual identification of surplus. In at least two of our surplus water cases reference is made to potential private interests which would undermine the security of any identification or award of such water. In *HC&S*, *supra*, the court alluded to the possible existence of riparian rights by naming such rights as among those which may have to be satisfied prior to surplus being available. But it was not until *McBryde* that such rights were recognized. Similarly in *Gay*, *supra*, Justice Perry referred to an appurtenant domestic water right that adhered to *all lands* upon which tenants resided in ancient times. *Territory v. Gay*, *supra*, 31 Haw. at 395.[30] Such rights had never before been established in this jurisdiction. *Gay*, carried to its extreme, would have suggested a multitude of unasserted rights to every watercourse in the land, none of which had been defined in terms of quantity or flow and each of which would have jeopardized available surplus.

At the very least, both cases implicitly recognized that the court retained the right to acknowledge and enforce previously undefined usufructory interests that could only exist in derogation of what might have been considered surplus.

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[30] In *McBryde* these rights were interpreted to constitute a part of the doctrine of riparianism applicable to this jurisdiction. 54 Haw. at 190-91, 504 P.2d at 1341.

Even if surplus water were not subject to previously undefined usufructory interests and even if other interests in a watercourse could have been exhaustively identified and quantified, the variability of stream flow would have made virtually impossible the effective quantification of any surplus. This was further complicated by the difficulties created by the court's distinguishing "storm and freshet surplus" from "normal daily" surplus in *Carter.*

Many of these problems were recognized in the arguments presented by the parties before this court in the original *McBryde* action. The trial court in *McBryde,* pursuant to what it perceived to be Justice Perry's "invitation" in *Territory v. Gay, supra,* awarded all surplus water to Gay & Robinson, without drawing any distinction between "normal" and "storm and freshet" surplus. This, of course, was in apparent contravention of *Carter v. Territory* and was partly responsible for the original appeal.

The positions urged by the private parties in the original appeal ran the gamut of conceivable formulations. Gay & Robinson, characterizing *Carter* as engendering "52 years of uncertainty", urged the court to overrule *Carter* and, as previously urged by Justice Perry in *Territory v. Gay,* to treat all surplus water as the property of the ili kupono or ahupuaa of its origin. Among the arguments advanced was the practical impossibility of effectively and meaningfully distinguishing between "normal daily" and "storm and freshet" surplus in practice.

McBryde Sugar Company argued for the retention of *Carter,* not only as the existing law of the land but as consistent with the practices of the ahupuaa from time immemorial. However, it argued in the alternative that:

> If this court determines that the rule of *Carter v. Territory* as to surplus storm and freshet flow should no longer be the law of Hawaii, then under any rule

> adopted by this court *all* surplus waters should be divided between the owners along the stream upon some equitable basis, whether it be *the riparian doctrine* modified to accord with Hawaiian practice, the rule of prior *appropriation as so modified, or some other just rule.*

McBryde Sugar Co., Ltd.'s Opening Brief at 83 (emphasis added).

Thus, even in the original *McBryde* action, the parties implicitly conceded that, far from being settled, the law governing surplus water was in a state of flux and confusion and that the court had both the power and the duty to reassess and resolve the situation.

## II.

The *McBryde* opinion, however, did not supplant the konohikis with the State as the owner of surplus waters in the sense that the State is now free to do as it pleases with the waters of our lands. In *McBryde, supra,* we indeed held that at the time of the introduction of fee simple ownership of these islands the king reserved the ownership of all surface waters. 54 Haw. at 187, 504 P.2d at 1339. But we believe that by this reservation, a public trust was imposed upon all the waters of the kingdom. That is, we find the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses. This is not ownership in the corporeal sense where the State may do with the property as it pleases; rather, we comprehend the nature of the State's ownership as a retention of such authority to assure the continued existence and beneficial application of the resource for the common good.[21]

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[21] The State unquestionably has the power to accomplish much of this through its police powers. *Hudson County Water Co. v.*

The nature of this ownership is thus akin to the title held by all states in navigable waterways which was recognized by the United States Supreme Court in *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892):

> It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction and interference of private parties. . . . [The doctrine permits the State to grant the use of such waters to private parties] [b]ut that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. . . . The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

The extent of the state's trust obligation over all waters of course would not be identical to that which applies to navigable waterways.[33] That such powers and obligations

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*McCarter*, 209 U.S. 349 (1908). We believe however that the king's reservation of his sovereign prerogatives respecting water constituted much more than a restatement of police powers, rather we find that it retained on behalf of the people an interest in the waters of the kingdom which the State has an obligation to enforce and which necessarily limited the creation of certain private interests in waters. *See*, Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970); Maloney, Ausness & Morris, *A Model Water Code*, *supra* at 81 (1972).

[33] As to the possible extent of the obligations and powers arising under this doctrine, *see*, Sax, *The Public Trust Doctrine*,

exist, however, is not open to question. Native Hawaiian practices respecting water, the tradition from which our water law ostensibly springs, have been consistently described as aimed at maximizing benefits for those involved;[33] the first statute of the kingdom governing water describes the resource as a bounty "which god has provided [which] should be equally distributed, in order that there may be an equal distribution of happiness among all those who labor in those places", Laws of 1842, Respecting Water for Irrigation; and the first and only post-Mahele statute explicitly governing water rights provides that "[t]he people also shall have the right to drinking water, and running water and the right of way . . .", Enactment of Further Principles, Act of August 6, 1850, L. 1850 p. 202. We therefore can only believe that water was considered to be "so particularly the gifts of nature's bounty that they ought to be reserved for the whole populace", Sax, *The*

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[33] A recent study has characterized the ancient Hawaiian system of water allocation as follows:

> Perhaps the essential feature of the ancient water system was that water was guaranteed to those natives who needed it, provided they helped in the construction of the irrigation system. Because agriculture was a matter of great importance to the Hawaiians, they were, in general, willing to contribute their efforts to the water system. The konohikis aimed to secure equal rights to all makaainana and to avoid disputes. Beneficial use of water by the makaainana were also essential to the continued delivery of water. The natives were subject to compulsory maintenance work on the auwais under the supervision of the konohiki. The konohiki, on the other hand, was reluctant to impose unreasonable burdens on the tenants because they were normally free to leave a particular plot if unhappy with the konohiki. Hence a "spirit of mutual dependence and helpfulness prevailed, alike among the high and low, with respect to the use of water." [Citations omitted.]

Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori and Yukimoto, *Water Rights in Hawaii*, in Land and Water Resource Management in Hawaii, 141 (1977).

*Public Trust Doctrine, supra* at 848, and that the reservation of the king's authority to "enforce the usufructs of the land for the common good", Laws of 1847 at 81, therefore represented an explicit reservation on behalf of the people of the waters of the kingdom to the extent that such title enabled and required him to insure the effective application and preservation of the resource for the benefit of the general public. *See McBryde, supra,* 54 Haw. at 186-87, 504 P.2d at 1339.

The necessity for the reassertion of this interest in *McBryde* becomes readily apparent upon an examination of the possible impact of the private parties' interpretation of pre-*McBryde* water law. For pursuant to this reading, prior to *McBryde,* there existed no apparent common law restraint upon the right of private parties to drain rivers dry for whatever purposes they saw fit. Such a system may have been deemed both appropriate and beneficial in other historical contexts. But this is no longer the case. The reassertion of dormant public interests in the diversion and application of Hawaii's waters has become essential with the increasing scarcity of the resource and recognition of the public's interests in the utilization and flow of those waters.[34] In *McBryde* we were called upon to assess a division of the waters of the Hanapepe river among the landowners of the ahupuaa and adjoining ilis. To have done so exclusively in accord with Appellees' reading of pre-existing caselaw would have been a gross oversimplification of the interest involved. For while there indeed exist relative usufructory rights among landowners, these rights can no longer be treated as though they are absolute and exclusive interests in the waters of our state.

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[34] Since 1978, this necessity and obligation has been a part of our state constitution. Haw. Const. art. XI, § 1:

CONSERVATION AND DEVELOPMENT
OF RESOURCES

> Section 1. For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public resources are held in trust by the State for the benefit of the people. [Add Const Con 1978 and election Nov 7, 1978]

The *McBryde* opinion was only the beginning of a necessary definition of the parameters of the State's authority and interests in Hawaii's waters. These parameters, we believe, should be developed on a case by case basis or by the legislature as the particular interests of the public are raised and defined. However, the opinion properly clarified the nature of respective rights to water, that is, it made clear that underlying every private diversion and application there is, as there always has been, a superior public interest in this natural bounty.

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Haw. Const. art. XI, § 7:

## WATER RESOURCES

Section 7. The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources. [Add Const Con 1978 and election Nov 7, 1978]

# APPENDIX C

## OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Selwyn A. ROBINSON, Eleanor Robinson, Russell S. Robinson, Ruth R. LeFiell, Marion R. Keat, Jean R. Weir, Selwyn A. Robinson, Eleanor Robinson, Bruce B. Robinson, Trustees under the Will of Aylmer F. Robinson, Helen M. Robinson, Individually and as Executrix, Estate of Lester B. Robinson, Bruce B. Robinson and Keith P. Robinson, *Plaintiffs,*

v.

George R. ARIYOSHI, Acting Governor, George T. H. Pai, Attorney General, Andrew S. O. Lee, Deputy Attorney General, Sunao Kido, Newton Miyagi, Larry E. Mehau, Manuel Moniz, Jr., Moses W. Kealoha and Hisao Munechika, Chairman and Members, Board of Land and Natural Resources, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, Ida Albarado, Helen B. H. Chu, Henry J. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriet U. Kano, Junichi Kano, Kiyoshi Kimata, Arnold W. F. Leong, Katherine A. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Iwao Nonaka, Kazuo Nonaka, Masa-Toshi Nonaka, Shigekichi Nonaka, Takano Nonaka and Takao Nonaka (small owners), *Defendants.*

Civ. No. 74-32.

United States District Court,

D. Hawaii.

Oct. 26, 1977.

## DECISION

PENCE, District Judge.

Succinctly stated, the nominal plaintiffs, the Robinson family (hereinafter G & R), ask this court:

(1) To enjoin defendants Ariyoshi, Amemiya, et al. (State Officials), who are respectively the Governor, Attorney General, and Chairman and Members of the Board of Land and Natural Resources of the State of Hawaii (State), from interfering with the transportation and use of waters of the Hanapepe River (River) for irrigation purposes in the same manner and with the same property rights therein as existed prior to the holdings of the Supreme Court of Hawaii (Supreme Court) in *McBryde Sugar Company v. Robinson*, 54 Haw. 174, 504, P.2d 1330 (1973) (*McBryde I*), and *McBryde Sugar Company v. Robinson*, 55 Haw. 260, 517 P.2d 26 (1973) (*McBryde II*), viz., that the right to running water could not have been and was not transferred into private ownership by the mahele and that therefore the "State is the owner of all the water" in the River;[1]

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[1] *As used in this* decision, the terms relating to Hawaiian surface water law are used in accordance with the usage developed in State decisions over a period of a century as follows:

(1) "Appurtenant" water denotes water anciently utilized (principally for taro cultivation);

(2) "Prescriptive" water denotes water rights which are acquired by usage under claim of adverse possession.

(3) "Normal" surplus water denotes water over and above that needed for the satisfaction of appurtenant and prescriptive water rights and inhering in the ownership of the *ahupuaa* or *ili kupono* on which the stream originates;

(4) "Storm and freshet" surplus water denotes water in excess of normal surplus water which is intermittently caused by storm precipitation;

(5) The term "Hanapepe River" includes the Koula and Manuahi streams which join to make the Hanapepe River.

(2) For a declaratory judgment that the decision of the Supreme Court in *McBryde I* is void and without effect to the extent that (a) it adjudicated the normal surplus water of the River to be the property of the State, subject only to appurtenant water rights (a claim never made by the State); (b) it adjudicated that rights to ancient appurtenant water cannot be separated from ownership of the land and can only be used on the land to which it was originally appurtenant; (c) it adjudicated that with respect to water awarded to them, neither McBryde nor G&R, nor any of the plaintiffs, may transport that water out of the watershed; and (d) that the English common law doctrine of riparian rights is the law governing the use of Hawaii's stream waters.

Also named as "defendants" were McBryde Sugar Company (McBryde), Olokele Sugar Company (Olokele) and Albarado, Chu *et seq.* (Small Owners). These nominal defendants in fact seek the same general relief against the State Officials as do G&R and, for purposes of this decision, unless particularly identified hereafter, they will herein be included with G&R in the term "plaintiffs" as distinguished from the nominal plaintiffs G&R. Olokele filed a cross claim against McBryde, the State Officials and the Small Owners, alleging that the decision in *McBryde I,* although not yet actually implemented by the State Officials, casts doubt upon the validity of its lease with G&R,

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See generally, *Territory v. Gay,* 31 Haw. 376, 383-84 (1930), *affirmed,* 52 F.2d 356 (9th Cir. 1931), *cert. denied,* 284 U.S. 677, 52 S.Ct. 131, 76 L.Ed. 572 (1931); *Carter v. Territory,* 24 Haw. 47, 70-71 (1917); W. Hutchins, The Hawaiian System of Water Rights, *passim,* analyzing all the Hawaiian decisions (1946) (Pl. Ex. 10); Report of the Water Commission of the Territory of Hawaii (Act 36 Legislature of 1915) (Ex. M-Fed.-3, pp. 9 & 20); Hawaiian Water Authority report "Water Resources in Hawaii", March 1959 (Ex. M-Fed.-4, pp. 63-65); Report of the House Committee on Interior and Insular Affairs, 83d Congress on the Territorial Irrigation Program in Hawaii by Hawaii Irrigation Authority, Dec. 13, 1954 (Ex. M-Fed.-16, pp. 7 & 8).

seeking determination of its rights in and to the waters. McBryde also filed a counterclaim against G&R and the State Officials seeking a determination of its rights in and to the waters. The Small Owners also filed a similar counterclaim against the State Officials. All plaintiffs seek a permanent injunction against the State Officials interfering with their rights.

All plaintiffs claim that the judgment of the Supreme Court was entered (a) without subject matter jurisdiction and (b) with neither procedural nor substantive due process being given to the plaintiffs, in violation of the Constitution and statutes of the United States. This court has jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, 2283, and 42 U.S.C. § 1983. As appears hereafter, the amount in controversy far, far exceeds $10,000.

## Background

In 1959, this case started like gentle tradewinds—each of the plaintiffs and the State claiming certain rights to and in the waters flowing down the River, in accordance with what each of the parties, including the State, thought was the well settled water rights law under Hawaiian statutes and decisions. McBryde filed its complaint on March 4, 1959 against the State, Olokele, Small Owners, etc., in the Fifth Circuit Court (Kauai) for determination of the appurtenant and prescriptive water rights of the parties and their rights to storm and freshet water in the River. No one, not even the State, raised any question about the severability of water rights from the riparian lands along the River, or the right to transport the River's waters for use out of its watershed. Nor was any question raised about the rights of the parties to the normal flow of surplus waters of the River (excepting only certain claims of rights therein acquired by prescription). All parties took for granted that these rights were solidly embedded in the law of waters of Hawaii. No one even mentioned the possible application of the English common law doctrine of riparian rights to Hawaiian waters.

The trial lasted from May 5 through August 17, 1965, and produced a record of 3,483 pages plus voluminous documentary exhibits. The trial judge's amended decision was filed January 30, 1969. In it he delineated the rights of the parties with respect to appurtenant water, prescriptive water, normal surplus water, and storm and freshet surplus water in the River.

All parties and the trial court accepted as unquestionably settled water rights law in Hawaii (1) that all normal surplus water belongs to the *konohiki* of the *ahupuaa* or *ili kupono*[2] on which it originates, (2) that water rights are severable from riparian lands and may be freely transferred to any land, within or without the watershed upon which they arose, subject only to the water rights of others in the same waters, and (3) that water rights may be obtained by prescriptive use.

Only McBryde, G & R and the State appealed, their appeals concerning, primarily, the trial judge's rulings on appurtenant and prescriptive water rights,[3] as well as the use of storm and freshet surplus water. The Supreme Court in *McBryde I* (a) upheld the trial court's adjudication of the appurtenant water rights of the State, McBryde and the Small Owners; (b) affirmed in part and reversed in part the adjudication of G&R's appurtenant rights; and (c) reversed the adjudication of McBryde's prescriptive rights.

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[2] The terms "*ahupuaa*" and "*ili kupono*" denote units of land. These terms, as well as the term "*konohiki*" are more fully defined in Justice Levinson's dissent in *McBryde II*.

[3] The earlier Hawaiian cases made no distinction between the terms "appurtenant" and "prescriptive" water rights inasmuch as initially there was no law pertaining to acquiring title by adverse use. It was not until the Limitation of Actions Act of 1870 that adverse use for a period of 20 years enabled one to claim property as of right. Thereafter the term "prescriptive" was used as indicated in n. 1(2), *supra*.

Then, ignoring both H.R.S. § 602-5(1),[4] and its own Rule 3(b)(3),[5] the Supreme Court decided, sua sponte, without warning to any of the parties nor argument from them (a) that the State owned all the waters of the River, be they normal,[6] storm or freshet, subject only to appurtenant riparian rights under English common law doctrine of riparian rights, which doctrine was declared to apply to all flowing surface waters of the State; (b) that there was no surplus water in any stream in the State—the State owned all flowing water; and (c) that neither G&R nor McBryde had any right to divert their appurtenant waters of the River outside its watershed.

As Justice *Maramoto* said in dissent: "That decision has no relation whatsoever to the judgment appealed from * * * and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued to this court." *McBryde I*, 54 Haw. at 201, 504 P.2d at 1346.

The majority's rationale in *McBryde I*, for these completely revolutionary holdings was grounded entirely on (1) a specific portion of the Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, adopted by the Land Commission on August 20, 1846 and approved by resolution in the Legislative Council on October 26, 1846,

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[4] § 602-5 Jurisdiction and Powers. The Supreme Court shall have jurisdiction and powers as follows:

(1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it from any other court * * *.

[5] Rule 3 Briefs (b) Opening Brief. Within 60 days after filing of the record on appeal, the appellant shal file an opening brief containing * * * (3) A short and concise statement of the * * * questions presented for decision * * *. Questions not presented according to this paragraph will be disregarded * * *.

[6] See n. 1, *supra*.

RLH 1925, Vol. II, 2124, 2128 (originally enacted as L.1847, at 81, 85) (hereinafter Land Commission Principles), which announced that the mahele left unimpaired the King's power "to encourage and even to enforce the usufruct of lands for the common good", *id.* at 186, and (2) § 7 of the Enactment of Further Principles (hereinafter Further Principles), originally published as L.1850, § 7, at 202, and presently compiled in HRS § 7-1, which, the court held, codified the doctrine of riparianism as it existed in Massachusetts and England in the mid-nineteenth century, and that under that doctrine water rights acquired by virtue of ownership of lands along the bank (*ripa*) of a stream or river were appurtenant exclusively to those parcels of land and could not be transferred to remote parcels. *Id.* at 191-98.

When all parties (except the State), including the non-appellant Small Owners and Olokele, petitioned for a rehearing, the court permitted G&R, McBryde and the Small Owners to address themselves only to two issues:

1. The pertinent portion of HRS § 7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

> "The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use."

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

2. The parties in this action introduced evidence as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found

> certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant? *McBryde II*, 55 Haw. at 268, 517 P.2d at 30.

Although those parties asserted constitutional grounds for reversal of *McBryde I* in their petitions for rehearing, the majority (three justices) in *McBryde II* refused to consider the same and summarily and most tersely, in a completely unenlightening per curiam opinion, held: "After careful consideration of the briefs and arguments presented at the rehearing, we find no reason to change the decision filed herein." *Id.* at 261, 517 P.2d at 27.

Justice Marumoto again dissented. Justice Levinson also dissented, and, in probably the finest opinion of his judicial career, made such a detailed, enlightening and convincing analysis of "long established and unique principles of Hawaiian water law," *id.* at 268-298, 517 P.2d at 27, that this court in substance adopts his analysis of those principles as a component part of its own decision.[7]

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[7] This court will not therefore, herein reiterate and reanalyze the judicial decisions of *Peck v. Bailey*, 8 Haw. 658 (1867); *Kaaiaea Mill Co. v. Steward*, 4 Haw. 415 (1881); *Kahookiekie v. Keanini*, 8 Haw. 310 (1891); *Loncaea v. Wailuku Sugar Co.*, 9 Haw. 651 (1895); *Horner v. Kumuliilii*, 10 Haw. 174 (1895); *Wong Leong v. Irwin*, 10 Haw. 265 (1896). *Cross v. Hawaiian Sugar Co.*, 12 Haw. 415 (1900); *Haw. Comm. & Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50 (1902) and 15 Haw. 675 (1904); *Palolo Land & Imp. Co. v. Wong Quai*, 15 Haw. 554 (1903); *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, 20 Haw. 658 (1911); *In Re Taxes Waiahole Water Co.*, 21 Haw. 679 (1913); *In Re Taxes Hui of Kanaha*, 21 Haw. 676 (1913); *McBryde Sugar Co. v. Andrade*, 22 Haw. 578 (1915); *Hilo Boarding School v. Terr.*

### Analysis of the Majority Opinion

A review of the authorities cited in note 7, *supra*, shows, beyond even a shadow or a doubt, that before *McBryde I* pre-Captain Cook Hawaiians had transported surface water out of its watersheds; that Kamehameha himself, before he had conquered the islands, in his native Kohala homelands similarly diverted water; that those justices of the Supreme Court of the Kingdom, when the Hawaiian language was dominant over the English, and when the justices were personally familiar with the events and principles giving birth to the Great Mahele, likewise stated, as appears in *Peck v. Bailey, supra* n. 7, 8 Haw. at 671, in 1867, Allen, C. J.:

> [I]rrigation early claimed the attention of the cultivators of the soil on these islands, not only from the fact of its being a necessity on most of the land, but from the fact that [taro raising] * * * required flowing water, and hence in all portions of these islands the traveler will see evidence of ancient water courses * * *. The water courses [in the ahupuaa involved in the case] have existed from time immemorial and were doubtless made by the order of some ancient King, and when the late King [Kamehameha III] conveyed these lands to the proprietors [pursuant to the Principle of the Great Mahele] the rights of the water courses, in their full enjoyment, was included as an appurtenance. While the King owned this Ahupuaa,

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*of Hawaii*, 23 Haw. 595 (1917); *Carter v. Territory*, 24 Haw. 47 (1917); *Foster v. Waiahole Water Co.*, 25 Haw. 726 (1921); *Territory v. Gay*, 26 Haw. 382 (1922) (*Gay I*); *Territory v. Gay*, 31 Haw. 376 (1930), *affirmed*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677, 52 S.Ct. 131, 76 L.Ed. 572 (1931) (*Gay II*) or the studies, texts and reports of J. Chinen, W. Hutchins, H. A. Wadsworth, R. Kuykendall, A. Day, the Water Commission of the Territory of Hawaii to the Governor (1917), Attorney General C. R. Hemenway (1908), L. Teclaff, or E. S. Handy and E. G. Handy. Justice Levinson has already most carefully, completely and accurately done that.

> he had a right to apply the water to what land he pleased, but after the water courses were made, * * * his conveyance of land bordering on the Wailuku river will include the rights of water in said river, which had not been before granted.

In the following paragraph Chief Justice Allen states:

> The kula land of the defendant has no riparian rights, and it does not appear * * * that it has any prescriptive rights of irrigation * * *. There is no doubt that the law which regulates the use of water would be somewhat different in tropical countries from that in a northern latitude.

One hundred six years after *Peck*, the Supreme Court dismissed Chief Justice Allen's conclusions of law as "dicta" and the court itself undertook to "review the Great Mahele and the laws which implemented" it. *McBryde I*, 54 Haw. at 184, 504 P.2d at 1337. The court then determined that because (a) the King had not conveyed "his sovereign prerogatives as head of the nation", one of which was the prerogative: "3rd. To encourage and even to enforce the usufruct of lands for the common good" and (b) the court "believe[d] that the right to water is one of the most important usufruct of lands", therefore "the right to water was specifically and definitely reserved for the people of Hawaii for their common good in all of the land grants." *Id.* at 186, 504 P.2d at 1338.

Thusly did the court "proceed to spit the victim for the barbecue",* and held that neither McBryde nor G&R owned the water of the River; the State owned it!

But the court was not through with its culinary creations. It held that while "appurtenant water right to taro land attached to the land when title was confirmed" under the mahele, nevertheless, because "the use of the word 'appurtenant' [citing Webster's Dictionary] indicates * * * water rights which [are] * * * annexed to that particular parcel of land conveyed by the original grant * * * the right to the use of water [so] acquired * * * may only be used [on the] * * * particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled.'' Thereby all of the case law and literature cited in note 7, *supra,* were dumped into the glowing coals. ''Thus, neither McBryde nor Gay & Robinson may transport [their appurtenant] water to another watershed * * *.'' *Id.* at 190-91, 504 P.2d at 1345. (footnote omitted).

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* Llewellyn, K., The Common Law—Deciding Appeals 364.

The court then withdrawing a sliver of dicta from the now burning *Territory v. Gay (Gay II), supra* n. 7, 31 Haw. at 395: ''Water for domestic purposes * * * is in any event assured under Hawaiian law'', decided that ''the right to domestic water * * * was * * * the right guaranteed in 'Enactment of Further Principles' enacted by the Hawaiian Government on August 6, 1850,'' viz., ''The people * * * also shall have a right to drinking water, and running water, and the right of way.'' The court then basted the sizzling plaintiffs: ''the term 'running water' must mean water flowing in * * * streams and rivers. We also believe that the right to 'running water' * * * guarantees a land owner the same flow of water in a stream * * * as at the time of the mahele, without substantial diminution,'' *i.e.,* ''in the form and size given it by nature.'' *McBryde I,* 54 Haw. at 191-93, 504 P.2d at 1342.

The court next proceeded to reason that because many of the missionaries had come from Massachusetts, bringing that state's law with them, law which was founded on English common law, therefore the right guaranteed in the Further Principles, *supra,* ''was * * * a statutory enactment of the doctrine of riparian rights'' as construed under the Massachusetts and English common law! Then and thereby the court gave to McBryde, G&R and the Small Owners the right to divert water on to their taro patches, then return it to the River and thereafter watch and enjoy the sight of the waters of the River flowing down to sea. *Id.* at 197, 504 P.2d at 1344.

McBryde's claims to any prescriptive rights in the water were also summarily disposed of: since the State owns all the water, no prescriptive or adverse use rights can ever be claimed against the State. The court, giving lip service to the doctrines of res judicata and stare decisis, held that "the rule of *Terr. v. Gay* * * * is binding on the State in this case." *Id.* at 179, 504 P.2d at 1335. Nevertheless G&R's claims to "normal daily surplus water" along with "storm and freshet waters" also went into the same coals. Since *Gay II* "was based upon the assumption that there would be * * * 'normal daily surplus water' after the water rights of all [other owners had been determined]," since both the State and McBryde owned lands below G&R along the River, and each was entitled to have the River flow "in the shape and size given it by nature" and that amount had never been determined—"thus, there can be no * * 'normal daily surplus water,' and Gay & Robinson is entitled to [no water] under" *Gay II. Id.*, 54 Haw. at 199, 504 P.2d at 1345.

The barbecue was done!

From the manner in which the court wrote the majority opinion in *McBryde I*, it was obvious that the court determined, without notice to any party of its intent, that it was going to completely restructure what was universally thought to be the well settled law of waters of Hawaii. The court sua sponte decided that all the flowing waters of the streams in the State should belong entirely to the State, subject only to appurtenant use under the English common law doctrine of riparian rights. It was strictly a "public-policy" decision with no prior underlying "legal" justification therefor. The majority wanted to see streams running down to the sea on an all-year-around basis. Knowing that this was squarely contrary to the accepted state of water rights law of Hawaii, the court first declared that the rule of stare decisis did not apply to water rights law. In this case stare decisis interfered with the court's policy!

The precedent used by the court for overthrowing the entire line of cases and authority set out in note 7, viz., *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940), was, as pointed out by Justice Marumoto in *McBryde I,* not sound authority on the facts for the result the court had decided it was going to achieve. *Helvering* did not concern real property—nor water—nor did it bring about a violent dislocation of the accepted law and virtually complete disruption of the established agricultural system of the state. Moreover, the portion quoted was incomplete. The entire sentence read: "But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision [here is as far as *McBryde I* wanted to quote, and so stopped], however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *McBryde I,* 54 Haw. at 180, 504 P.2d at 1335. The very doctrine which *McBryde I rejected* was by virtue of having been tested in law and in fact for over a century and a half *more embracing in its scope, intrinsically* found to be *sounder* by Hawaii's kings, jurists, legislators and businessmen, and *verified* by actual *experience* with the results of the doctrine.

The speciousness of the reasoning of the majority for such overthrowing is well illustrated by the method in which it held that "the right to water was specifically and definitely reserved for the people of Hawaii for their common good. *Id.* at 186, 504 P.2d at 1338. The court's syllogism went somewhat thusly: The function of the Land Commission was to investigate and pass on all claims to land in the Hawaiian Kingdom and the Commission adopted certain principles in 1846 which were approved by resolution of the legislature provided that "all claims for landed property * * * shall be tested by those principles, and according to them be confirmed or rejected." *Id.* at 185, 504 P.2d at 1338. By those principles the Commission was to convey the King's "private or feudatory right * * * not his sovereign prerogatives as head of the nation." *Id.* at 186, 504 P.2d at 1338. Since the 3rd prerogative "to encourage and even to enforce the usufruct of lands for the common good" and the right to water is an important usufruct, therefore "to encourage and * * * enforce the usufruct of lands" meant that the King *reserved* all of the water for the Kingdom; the owners of the *ahupuaas* and *ilis kupono* acquired no vested interest in the streams contained within their lands.

If the court's logic were to continue, then it was not until the Enactment of Further Principles (later § 577 RLH 1925) three years later that the owners of the lands acquired any rights whatsoever to water. That Act, according to the 1976 interpretation of the court's majority, meant that for the first time in three years the owners of the land had the right to drinking water and running water and rights of way. In holding that the Enactment of Further Principles made it "crystal clear that the statute reserved to land owners the right to both 'drinking water' and 'running water' ", *id.* at 192, 504 P.2d at 1342, the court completely bypassed the fact that the section was never meant to apply to the general public or to general land owners' rights! The heading of the section, with greater crystal clarity, shows that it was intended to apply to "Building materials, water, etc.; landlords' titles subject to tenants' use." *Id.* at 192, n. 17, 504 P.2d at 1341. The statute was never intended to apply to the general public or reserve anything for the "people" of the Kingdom. It was solely aimed at giving to the *hoaainas*, as former tenants at sufferance but now owners in fee of a *kuleana* within an *ahupuaa*, the right to take firewood, house-timber, thatch, etc., "*from the land on which they live*, for their own private use * * * The springs of water, running water, * * shall be free to all [*hoaainas*], on all lands granted in fee simple." *Ibid.* (emphasis added). The statute obviously applied only to the rights of the tenants vis-a-vis their former landlords and Justice Robertson, in *Oni v. Meek*, 2 Haw. 87, 96, in 1858, upon analyzing the meaning of this very section held that the word "people" as used therein was "synonymous with the term *tenants*" (emphasis in original). Nevertheless the court unrestrictedly leaped over the obvious fact and the ancient law thereon and concluded that by those simplistic words the English common law rule of riparian rights was engrafted into the Hawaiian law. Manifestly the court had paid no attention to the statement of Justice Robertson in *Kake v. C. S. Horton,* 2 Haw. 209, 211 (1860):

> It is argued by counsel for the defendant, that the Common Law of England is in force in this Kingdom, and that therefore the action cannot be maintained in this Court. In our opinion, this argument is not sound. We do not regard the Common Law of England as being in force here *eo nomine* as a whole. Its principles and provisions are in force so far as they have been expressly, or by necessary implication, incorporated into our laws by enactment of the Legislature; or have adopted by the rulings of the Courts of Record; or have become a part of the common law of this Kingdom by universal usage; but no farther.

The entire rationale of the majority is one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject.

Although, as indicated above, the English common law doctrine of riparian rights had never been raised by any of the parties—not even the State—the Supreme Court lifted out of context the Statement of Chief Justice Perry in *Gay II, supra,* 31 Haw. at 395:

> Water for domestic purposes on a lower ahupuaa is in any event assured under Hawaiian law. Every portion of land, large or small, ahupuaa, ili or kuleana, upon which people dwelt was, under the ancient Hawaiian system whose retention should, in my opinion, continue unqualifiedly, entitled to drinking water for its human occupants and for their animals and was entitled to water for other domestic purposes. At no time in Hawaii's judicial history has this been denied.

The court then rhetorically asked itself: "Now what is this Hawaiian law or ancient Hawaiian system mentioned in the decision?" *McBryde I*, 54 Haw. at 191, 504 P.2d at 1341. Next the court, arguing for itself, stated:

> [T]he term 'running water' must mean water flowing in natural watercourses, such as streams and rivers. We also believe that the right to "running water" as contained therein guarantees a land owner the same flow of water in a stream or river as at the time of the mahele, without substantial diminution, or the right to flow of a stream in the form and size given it by nature. This right may be in connection with his right of laundering, canoeing, swimming, bathing, etc. *Id.* at 192-93, 504 P.2d at 1342.

Finally the court determined that the reason such "law" was enacted was because the missionaries, "many of whom came from Massachusetts, * * * brought with them the English common law as recognized in Massachusetts." *Id.* at 193, 504 P.2d at 1342. The court continued then to analyze the Massachusetts and English law of waters and concluded:

> It would appear that in light of history and historical background of the Hawaiian Kingdom, the provision of the law enacted in August 6, 1850 which reserves to property owners the "right to drinking water and running water," was a codification or statutory enactment of the doctrine of riparian rights recoginzed as part of the common law by the English and Massachusetts courts. *Id.* at 197, 504 P.2d at 1344. (footnote omitted).

Contrary to the Supreme Court's conclusatory assumption that it was the missionaries who engrafted Massachusetts common law upon Hawaiian, it was John Ricord,[*]

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[*] John Ricord was educated in New York but thereafter practiced in Louisiana, Texas, Arizona, Florida and Oregon, before coming to Hawaii. He arrived February 27, 1844 and was ap-

Hawaii's first lawyer who, after being appointed attorney general in 1844, drafted the three Organic Acts of 1845-47, *i. e.*, to Organize (1) the Executive Ministry, (2) the Executive Departments, and (3) the Judiciary Department.

William L. Lee[10] was Hawaii's second lawyer, who in August 1847 was appointed president of the Board of Commissioners to Quiet Land Titles and a month later, in September 1847, was appointed to the Privy Council. It was he who presented to the Privy Council details for the plan for actual division of the lands in The Mahele.

In 1850 Elisha H. Allen,[11] the third lawyer, arrived as Ameican counsel and in September 1853 was appointed minister of finance. In 1857, Allen became Chief Justice of the Supreme Court of Hawaii.

Ricord, Lee and Allen, to be sure, were all educated in Massachusetts and New York. They were thus very familiar

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pointed attorney general of the Kingdom on March 9, 1844. It was he who suggested the enactment of the "Principles" before the legislative body on May 21, 1845.

[10] William L. Lee was born in New York in 1821; educated at Harvard University, and in 1844 commenced the practice of law at Troy, New York, having been admitted to practice before the Supreme Court of the State of New York. Lee arrived in Honolulu (presumably on his way to Oregon) on October 12, 1846. At the age of 26, in 1848, Judge Lee was elected Chief Justice of the new Superior Court.

[11] Chief Justice Allen was born in New Salem, Massachusetts, in 1804; educated at Williams College; practiced law in Vermont, Maine and Massachusetts from at least 1835 to 1848; and served in the legislatures of both Maine and Massachusetts, as well as having been a United States Congressman from Maine to the 29th U.S. Congress. He was appointed U.S. Consul to Hawaii in 1849 and arrived in Hawaii in 1850. He was appointed Minister of Finance of the Hawaiian Kingdom in 1853, and in 1857 was appointed Chief Justice of the Hawaii Supreme Court, serving as such until 1877. From 1863 until his sudden death on January 1, 1883, he also served as the Hawaiian Minister to Washington.

with the English common law. In writing and making law for the Kingdom of Hawaii, however, each of them followed out the Resolution of the legislature of September 27, 1847, *i. e.*, that the laws of Hawaii should be "adapted to the wants and conditions of the Hawaiian Nation." Thus Lee, in preparing the Criminal Code, acknowledged his indebtedness to those who had prepared a penal code for Massachusetts (Common Law) "and also to those of Mr. Livingston in the penal code of Louisiana [Code Napoleon]. From both * * * I have borrowed largely." And Judge Lee concluded, "My chief aim has been to be so brief, simple and direct, in thought and language, as not to confuse the native, and yet so full as to satisfy his increasing wants, together with those of the naturalized and unnaturalized foreigner."[12]

The Supreme Court in 1976, therefore, could not with integrity dismiss Chief Justice Allen's statements as to the ancient Hawaiian law of waters as dicta. Chief Justice Allen in 1862 was far, far more familiar with the Hawaiian "principles" and the customs, practices and laws of the Hawaiian Kingdom than were the justices of the Hawaii Supreme Court over 100 years later.

As appears from the wording of the statute relied on by the Supreme Court, neither Ricord nor Lee nor Allen directly used the Massachusetts common law in drafting the Kingdom's first codes. And Allen, as shown by his opinion in *Peck, supra,* founded his decision upon the Hawaiian practices and customs—not solely upon the English common law.

The Supreme Court summarized its decision thusly:

VIII. SUMMARY

1. As between the State and McBryde, and McBryde and Gay & Robinson, the State is the owner of the

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[12] Dutton, Meiric K., William K. Lee Hawaii's First Chief Justice & Chancellor of the Kingdom 22.

water flowing in the Koula Stream and Hanapepe River. However, the owners of land, having either or both riparian or appurtenant water rights, have the right to use of the water, but no property in the water itself.

2. The State, McBryde and Gay & Robinson have both appurtenant and riparian rights to water in connection with land within Hanapepe Valley. However, under claim of such rights, neither McBryde nor Gay & Robinson may transport water to another watershed.

3. Under the doctrine of riparian rights, owners of land adjoining natural watercourse have the right to a flow of a river or stream in the shape and size given it by nature. Thus, under such right there can be no "normal daily surplus" water.

4. McBryde has no prescriptive right to water, as no one may claim title or interest against property owned by the State.

5. "Storm and freshet" water is the property of the State.

Neither McBryde nor Gay & Robinson has any right to divert water from the Koula Stream and Hanapepe River out of the Hanapepe Valley into other watersheds.

The immediate and obvious impact on the parties was:

1. "Water rights" which, as private property had been bought, sold and leased freely, and which had been the subject of taxation as well as condemnation, were for all practical purposes rendered worthless.

2. G&R and Olokele, which had expended almost $1 million in building an extensive water transportation system for irrigation of their sugar lands, found their system made unusable and much of their cane lands destined to become pasture. McBryde was destined to suffer the same fare.

Thousands of acres of sugar and other agricultural lands on almost every major island would be exposed to the same fate, even though the owners were not parties to the suit.

The State acquired, free of charge, all of the running waters of the State, subject only to the rights of riparian owners of land under the common doctrine of riparian rights.

As indicated above, the Supreme Court, on rehearing, paid no attention to plaintiffs' challenge to the constitutionality of its decision, even though this was raised in plaintiffs' briefs on their application for rehearing. The constitutionality of that decision, then, becomes the basic question now before this court for determination.

### Findings of Fact

Turning now to the trial before this court, and based on the record, including all prior proceedings in *McBryde v. Robinson*, the pleadings, evidence adduced, exhibits, stipulations, requests for admission, and answers to interrogatories, the court finds:

1. The Findings of Fact of the trial court consisting of Findings 1 to 65 (Plaintiffs' Exhibit 7, pp. 7 to 49), none of which were modified on appeal by the Supreme Court, are adopted as facts in determining the constitutional and other federal claims before this court.

2. In the Pretrial Order entered on March 4, 1965 in *McBryde* approved by the State, McBryde and G&R, it was admitted that G&R were "the owners of the ilis kupono of Koula and Manuahi, that plaintiff (McBryde) is the owner of the ilis kupono of Eleele and Kuiloa and that the State is the owner of the ahupuaa of Hanapepe." (Answer to Request No. 4 of G&R for Admissions)

3. The ownership of the normal surplus water of the Koula Stream which flows into the River was admitted in the proceedings in *McBryde* to be the property of G&R and

at no time did the State or any other party deny or dispute G&R's right to take the normal surplus water so owned out of the River and to transport the same to Makaweli. (Answer to Requests Nos. 6, 7 and 8 of G&R for Admissions)

4. At no time prior to the entry of the judgment by the Supreme Court in *McBryde I* did any party dispute or deny the right of any other party to transport any water which he might own by "appurtenant", "prescriptive" or "normal surplus" right for use on lands other than those from which those rights originated, and to sell or lease such rights separate from the lands from which such rights originated. (Answer to Request No. 10 of G&R for Admissions)[18]

5. In the trial of *McBryde,* the State conceded that McBryde was entitled to the appurtenant water rights of LC Aw 7928 Apanas 1 and 2 to Maluaikoo, LC Aw 10010 to Makahiki, LC Aw 10526 to Naloheelua and LC Aw 19-B to Kanehiwa, although McBryde had no title or interest other than said water rights in said lands. (Answer to

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[18] In *Gay II,* 31 Haw. at 398 et seq., Chief Justice Perry discussed the inappropriateness and "unsuitability" of the riparian system to conditions in Hawaii in general and in Hanapepe in particular; "* * * our largest and most fertile tracts of land are not riparian and would have no water and no agricultural development under that system * * * under the Hawaiian system the water appurtenant to each land belongs to the owner of the land, it was severable therefrom and was transferable * * * to other lands * * * * * * riparian or nonriparian * * *. There was no limitation in favor of lands within the same watershed or valley * * *. It could be diverted to other watersheds.

Transferability of surface water for irrigation of sugar lands outside the watershed has been consistently recognized in Hawaii since at least 1867 when Chief Justice Allen gave judgment in *Peck v. Bailey, supra,* n. 7. Hobbs, Hawaii A Pageant of the Soil 72-73 (1935). McBryde's Trial Brief filed herein February 5, 1976, Appendix A, pp. 2-17.

Request No. 11 of G&R for Admissions, Conclusions contained in "Court Exhibit 1", Pl.Ex. 7, pp. 39-43)

6. In the *McBryde* trial the State claimed and was awarded by the judgment of the Fifth Circuit Court the appurtenant water rights of 0.26 acres of land in Grant 11149 (formerly Government Lot 6B) and of 0.14 acres of land in Grant 10832 (formerly Government Lot 54B), although the State had no title or interest other than said water rights in said lands. (Answer to Request No. 12 of G&R for Admissions)

7. The only issues of fact or law tried in *McBryde* in the Fifth Circuit Court were (1) the identity and extent of privately or publicly owned land having appurtenant water rights, and privately or publicly owned water rights owned separately from land, (2) the quantity of water attributable to the identified water rights, (3) McBryde's claim by adverse possession against G&R to prescriptive water out of G&R's normal surplus water and the quantity of such prescriptive water, and (4) the claims of the State, McBryde and plaintiffs to a division of the storm and freshet surplus. (Answer to Request No. 13 of G&R for Admissions and transcript, Pl.Ex. 1, p. 99 *et seq.*)[14]

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[14] Justice Marumoto's formulation from the record of the issues is as follows: (Pl.Ex. 7 at 96)

> "The issues in this case, raised and tried in the circuit court, were; (1) the quantity of water of Koula Stream and Manuahi Stream to which McBryde is entitled as appurtenant to its lands in the Hanapepe valley; (2) the quantity of such water to which the State is entitled as appurtenant to its lands in the valley; (3) the quantity of such water to which other owners of lands in the valley are entitled as appurtenant to their lands; (4) the quantity of such water which McBryde is entitled to take under a claim of prescriptive right; and (5) the right of G&R, the State, McBryde, and other owners of lands in the valley to the storm and freshet water of Koula Stream and Manuahi Stream. Those also were the issues and the only issues presented and argued to this court on the present appeal."

8. Following the Supreme Court opinion in *McBryde I*, timely petitions for rehearing were filed by McBryde and by G&R (Pl.Ex. S.C.-62 and S.C.-65) and a "Motion for Partial Vacation of Opinion and for Opportunity to Present Evidence and Argument" was filed by Olokele, its *first* active appearance in the appeal to the Supreme Court (Pl.Ex. S.C.-59) which was promptly denied (P.L.Ex. S.C.-60). The two petitions and the motions contended *inter alia* that the transformation of private property (without claim having been made therefor by the State) into public property and by judicial process, without compensation to those whose property was so taken, violates due process of law, and that the deprivation of property was effected without giving the parties the opportunity to present evidence and to be heard required by procedural due process.

9. On June 18, 1973, the Supreme Court entered an order directing McBryde, G&R, the State and the Small Owners to submit briefs limited to narrow issues related to (1) the construction of HRS § 7-1 [18] and (2) the use of appurtenant water on lands other than to which the right is appurtenant (Pl.Ex. S.C.-66). The restriction of the issues precluded argument or hearing as to the basic question of the validity of the State appropriation of privately owned surface water.

10. Since no party appealed from the trial court's award to the Small Owners of appurtenant water rights of 50,050

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[18] The Supreme Court excluded argument on the validity of its revolutionary holding that the Land Commission Principles, *supra*, "specifically" and "emphatically" precluded the conveyance of any water in the mahele, and thence all surplus water has always been publicly owned (Opinion Pl.Ex. 7, pp. 185-87). This *ex cathedra* pronouncement was so obviously without rational basis as to have been characterized as "patently incorrect, if not absurd" by Justice Levinson (*id.* at 120, 123, 124; Pet for Rehearing McBryde, Pl.Ex. S.C.-65 at 76-84). See Hutchins, *op. cit. supra* (Pl.Ex. 10) at 100-102, and McBryde's Brief. (Pl.Ex. S.C.-72 at 2-33).

gallons per acre per day, like Olokele, none of the Small Owners took an appeal from the trial judge's award.

11. At oral argument on September 18, 1973, the justices then stated that argument would be limited to the two issues specified (*supra*, Finding 9). (No record exists of the oral argument, the court having refused to have an official reporter present.) Plaintiffs were given no opportunity to argue against the *McBryde I* decision forbidding transfer of their waters out of the watershed, which deprived them of most of the value of their water rights. The majority opinion after rehearing was, as indicated *supra*, a curt *per curiam* that the court found "no reason to change the decision filed herein." The majority refused to hear or consider plaintiffs' constitutional claims.

12. No payment was or ever has been offered or made to any plaintiff by the State for the taking of their several vested properties in their appurtenant and prescriptive water rights.

13. In 1927, the Territory of Hawaii, the State's predecessor in interest, commenced an equity proceeding in the *First* Circuit Court (Oahu) against G&R, Hawaiian Sugar Company, Limited (Olokele's predecessor in interest), McBryde and 133 others alleging that the Territory had water rights to 220.72 acres of land in Hanapepe Valley and was entitled to approximately 50,000 gallons per acre per day of water. It also alleged that McBryde was the owner of 110.65 acres of land in Hanapepe Valley "entitled to water for irrigation purposes." It alleged that the 133 others had water rights for irrigation or for domestic purposes and asked that G&R be enjoined from diverting water which had the effect of depriving the lower owners of water rights to which they were entitled. Since it concerned water on Kauai, this case was dismissed under the doctrine of *forum non convenience* (see *Territory v. Gay*, 32 Haw. 404 (1932)). The filing of this complaint constituted a judicial admission by the Territory that the water rights of McBryde whether ancient, appurtenant or

prescriptive were being properly used by McBryde for irrigation purposes.

14. In 1927 G&R in contemplation of a suit to determine water rights in Hanapepe Valley perpetuated testimony of *kamaaina* witnesses (Ex. G&R-G-3). In this perpetuation proceeding, the Territory and McBryde took the position that when *kamaainas* referred to land as "*kula*" (dry), the *kamaainas* meant that the lands were not in taro cultivation at the time they (the witnesses) first were familiar with the land, but could nevertheless be "wet" lands at the time of the mahele and thus entitled to water rights. The position of McBryde and the State was sustained by the *McBryde* trial court over the objection of G&R in adjudicating the water rights in Hanapepe. (Findings of Fact, Pl.Ex. 7, pp. 30-31)

15. Since the amount of water per acre used in taro cultivation in 1848 was the basic measure for water rights under Hawaiian law, in 1930, the Territory joined with McBryde in a scientific experiment running over several years to simulate the ancient Hawaiian practice of taro cultivation at the time of the mahele, in order to determine the measure of water duty to be awarded periodically. The *McBryde* trial court made findings based on the results of this experiment.

16. Upon dismissal of the equity suit referred to in Paragraph 13 above, Equity No. 2911 (*Territory v. Gay*, Ex. M-J-6, p. 3) was filed in April 1928 citing only G&R and Hawaiian Sugar Co., Ltd. as being parties necessary to determine ownership of the normal surplus water. The purpose of the suit was "to establish a claim by the Territory to title in surplus waters arising on the lands" of G&R so as to utilize the same to continue the irrigation of *kula* land in the Ahupuaa of Hanapepe below the boundaries of the *ilis* of Manuahi and Kouls (Ex. M-J-6, p. 53). In these proceedings Territory of Hawaii alleged that the Ahupuaa of Hanapepe

> "is a portion of the public lands of the Territory of Hawaii, the fee simple title to which is in the United

> States of America and the Territory of Hawaii, under and by virtue of the provisions of the laws of the United States of America, is entitled to the use, possession and control thereof." (Ex. M-J-6, p. 6)[16]

By *Gay I* it was decided that "the Ili OF Koula though situate within the Ahupuaa of Hanapepe was never a part of the ahupuaa," 26 Haw. at 393, it was an *ili kupono*.

17. The trial court, in that suit, the Supreme Court on appeal, and the Ninth Circuit Court of Appeals on further appeal all recognized that *Gay II* concerned only "normal" and daily "surplus waters" and not prescriptive and appurtenant rights and made a final determination of the ownership of such "normal" surplus.

18. The judgment in *Gay II* determined that two of the partners of G&R as the adjudicated owners of the *ili kupono* on which the stream arose, and not the Territory, were the owners of the normal surplus waters flowing from their lands into the River and as such were free to transport normal surplus water to irrigated sugar lands on adjacent lands outside the valley.[17]

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[16] In *Gay II, supra* n. 7, the Ninth Circuit Court of Appeals paraphrased the Territory's petition as a claim to be the owner of so-called "surplus waters" under the Hawaiian law, by virtue of the rights of the King of Hawaii, ceded to the United States and by it conferred in trust upon the Territory.

[17] Justice Marumoto's summary, *Territory v. Gay*, is as follows (Pl.Ex. 7, at 96):

> "I do not think that there can be any question that *Gay II* established the following: (1) the ownership by G&R of the normal surplus water of Koula Stream and Manuahi Stream, and (2) the right of G&R to divert such surplus water to areas beyond the Hanapepe valley.
>
> "*Gay II* is res judicata only as between the State and G&R. However, no party other than the Territory every challenged the ownership by G&R of the normal surplus water of the two streams. Nor has any party ever questioned the right of G&R to divert such water from the Hanapepe valley to areas outside of the valley."

19. In 1941, G&R leased land at Makaweli to Olokele for the purpose of conducting a sugar plantation, with the requirement that G&R deliver a share of G&R's water from Hanapepe to Olokele at Makaweli, *i.e.,* out of the Hanapepe watershed. In the years 1945 through 1949, Olokele expended $788,839.35 on building the Hanonui Tunnel. (Answers to Requests Nos. 21, 22 and 23 of G&R for Admissions)

20. G&R and its lessees (Olokele and Hawaiian Sugar Co.) and McBryde have respectively spent sums accounted in the millions of dollars to develop sugar plantations at Hanapepe, Makaweli, Eleele, Wahiawa, Koloa, Lawai and Kalaheo, all on the Island of Kauai, which include areas where sugar cane cannot be grown without irrigation by water diverted from its natural watershed. (Testimony of Selwyn A. Robinson, Roland D. Gerner, Richard H. Cox and Ex. M-J-6, p. 53) The rainfall in the area of G&R's and Olokele's sugar cane fields is approximately 23 inches a year, inadequate to grow cane. Irrigation necessarily depends on bringing in water from the Manuahi and Koula streams on the east and the Makaweli river on the west. The Makaweli river, while it runs wholly within G&R's *ahupuaa* of Makaweli, is in a separate watershed. (Testimony of Selwyn Robinson, Ex. 0-15)

21. For a period in excess of seventy-five years, the several governments of Hawaii have executed the laws of the Kingdom, the Territory and the State of Hawaii in a manner which has been guided by court decisions on the question of surplus water, which expressly or implicitly acknowledged the title to surplus water rests in the owner of the *ahupuaa* or *ili kupono* in which it originates and that such water may be transported out of the watershed of origin. (Testimony of Richard H. Cox and Ex. M-Fed.-10)[18]

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[18] Ex. M-Fed.-10 is a long schedule of water rights purchased by McBryde from 1899 to 1962 through acquisitions of *konohiki* lands and *kuleanas* as well as separated water rights. The schedule shows that lands were sometimes sold to the State or to private persons, reserving water rights.

22. Since 1899, McBryde has been continuously engaged in the production of sugar cane and its irrigation water has been partly surface water and partly underground water. The transmittal of water from the River and the use of this water in part on the Eleele and Koloa Plantations and outside the Hanapepe watershed for irrigation has been continuous since the construction of the original pump on the River prior to the year 1900. (Stipulation, Ex. M-Fed.-1)

23. McBryde cultivated 5,955 acres on its sugar plantation which extends from Hanapepe to Waikomo (Koloa), a distance of 9 miles and, except for 300 acres, all is irrigated land. An average of 30 to 40 million gallons per day is utilized for irrigation, coming from four principal surface supplies providing over half the supply, and five pumping stations with underground supplies. McBryde produced 31,716 tons of sugar in 1972 with a gross income from sugar and molasses of $5,536,531.00. (Ex. M-Fed.-13, pp. 1, 2)

24. McBryde's surface and underground water supply from Hanapepe averages over 20 million gallons per day and is transported by three major ditches extending 5½ miles to the east of Hanapepe Valley; and that these Hanapepe supplies provide the primary irrigation supply for 3,200 acres of cane on the *ili* of Eleele and *ahupuaas* of Wahiawa, Kalaheo and Lawai. (Ex. M-Fed.-13, p. 2)

25. McBryde's surface supply from the Wahiawa, Lawai and Omao streams provides about 13,000,000 gallons per day of irrigation water for 1,790 acres of its other cane lands. (Ex. M-Fed.-13, p. 2)

26. In reliance on its water supply McBryde had expended, as of December 31, 1972, the sum of $11,863,392.43 in capital improvements for its irrigation system, mill machinery, equipment and other facilities still in service to operate the plantation as follows:

| | |
|---|---|
| Irrigation System | |
| Water development | $ 340,131.00 |
| Reservoir | 752,646.02 |
| Pump station | 420,190.52 |
| Ditch system | 631,576.07 |
| Other irrigation facilities | 1,088,247.07 |
| Subtotal | 3,232,790.68 |
| Factory and other buildings | 996,559.65 |
| Machinery and equipment | 5,173,912.19 |
| Roads and bridges | 502,855.00 |
| Electric power system (developed primarily to provide power for the pumping of irrigation water) | 1,656,950.30 |
| Domestic water and sewer systems | 300,324.61 |
| Total | $11,863,392.43 |

Expenditures for capital improvements listed above do not include expenditures made for acquiring land or for improving the condition of the land for purposes of cultivation, nor does the compilation include the cost or value of growing crops. (Ex. M-Fed.-13, pp. 2, 3)

27. The parties herein have stipulated that plaintiff McBryde and Olokele have incurred

> "substantial expenditures subsequent to 1930 in the diversion of water from the watershed to the Hanapepe River and in the use of that water on their respective plantations. The amounts expended in the construction of the Hanonui Tunnel alone were in excess of $119,000 by the Robinsons and $788,880 by Olokele. McBryde's expenditures exceeded $558,000 for pumping equipment and siphons and $60,000 for the construction of a reservoir to store water." (Ex. 0-14)

The figures referred to in this stipulation are included within the total expenditures of $11,863,392.43 shown in Paragraph 26 above.

28. By an "Agreement and Bill of Sale" made as of August 1, 1941, Olokele was assigned the lease of Hawaiian Sugar Company on its plantation near Hanapepe. (Testimony of Selwyn A. Robinson; Ex. 0-1). Olokele leases from G&R the lands to which waters were being diverted from the River since the filing of *Territory v. Gay*. (Ex. 0-2, 0-3 and 0-4). When G&R leased property to Olokele (and Hawaiian Sugar) the leased properties were being used for sugar cultivation with waters transported from the watershed of the River. (Testimony of Selwyn A. Robinson and Roland D. Gerner)

29. The plantations of G&R, Olokele and McBryde could not be operated at anywhere their present size without water from the watershed of the River. (Testimony of Selwyn A. Robinson, Roland D. Gerner, and Richard A. Cox)

30. The Robinson lease to Olokele, dated July 15, 1944 (Ex. M-1-27) restricted Olokele to the growing of sugar cane (p. 67). The rent was based on a formula which may be called 5% of Olokele's gross proceeds from "all sugar cane and molasses and by-products" (pp. 19-21) or 25% of its net profits (pp. 21-23). The lessors agreed to maintain and operate the Olokele ditch and the Koula ditch and to deliver 57% (p. 28) of the water from those two ditches which are connected. (See Ex. 0-15). The lessors agreed to deliver their harvested cane to lessee's mill, and lessee to make it into raw sugar (pp. 38-48).

31. G&R employs 174 employees on its sugar plantation and 11 on its ranching operation. In 1973 its pension obligations to its employees demanded a lump sum capital fund in excess of $1,555,000. (In 1975 G&R paid Prudential Insurance Company of America $1,241,026.53 to fund its pension obligations.)

32. Without irrigation water, the only use for most of G&R's sugar lands would be as part-time pasture, because the intermittent flowing streams would provide drinking water for the cattle only during the rainy months. Therefore, only the areas near enough to the Makaweli River could be used as pasture during most of the year.

The sugar lands, if unirrigated, would be appraised as "very poor pasture," at an assessed value of $8 an acre, or $4 if dedicated to agricultural use. In contrast, "cane" lands are assessed at $666 an acre (or $333 if dedicated), indicating $951.42 an acre as a sound value.

33. Before *McBryde I,* the Small Owners could sell their water rights (usually to one of the three plaintiff plantations) at a "rule of thumb price" of one acre of water rights for one acre of dry land. Some had sold, and thus severed, appurtenant water rights. *McBryde I* rendered these severed rights useless and of no value.

### State Action

34. For many years, some of the Small Owners used portions of the waters owned by them on lands to which the waters used were not originally appurtenant. (Ex. A-3, Testimony of Hideo Nonaka

### Governmental Recognition of Private Ownership of Water and the Transportability of Water

35. The defendant State Officials and their predecessors, the State and its predecessor, the Territory of Hawaii, have for at least a century, repeatedly entered into a variety of transactions recognizing private ownership of normal surplus water and the right of persons with rights to appurtenant, prescriptive, and surplus waters to divert those waters for use beyond the watershed of origin. By way of illustration, these transactions include the following:

(a) the taxation of water as private property and the valuation of land for tax purposes with consideration of the enhancement in value resulting from the land's access to water diverted from beyond the watershed of origin;[19]

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[19] Ex. M-Fed.-1, attachments to paragraphs 4, 5, 6, 7, 8 and 10; *In Re Taxes, Waiahole Water Company, supra* n. 7; Testimony of Richard A. Cox.

(b) the acceptance by the State of forest reserve surrenders under which water rights were reserved to the transferor;[30]

(c) transactions (including the lease by the State to Olokele of a portion of Olokele's Hanapepe Plantation) in which property is leased to private parties with the government reserving the right to transfer the water rights of the leased property to others;[31]

(d) the condemnation of property with water rights reserved to the condemnee;[32]

(e) transactions in which the transportability of water beyond the watershed of origin is specifically recognized;[33]

(f) transactions in which water rights were sold by the Territory for use outside of the watershed of origin.[34]

36. The existing State tax statute (HRS § 246-10(f)) lists "water privileges, availability of water and its costs" as a factor to be considered in fixing the valuation of the land. (Ex. M-Fed.-1, Attachment Para. No. 7). Plantations owning private surface waters have been and are being assessed a tax on the higher value of their land by reason of the availability of the water outside the watersheds of origin. The application of the State formula developed by the tax administrators for the valuation of irrigated sugar lands is based on the State's assumption that surface waters can be privately owned and transported for irrigation as determined by the consistent Hawaiian decisions.

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[30] Exs. 0-13 and M-Fed.-1, paragraph 13 and attachments to paragraphs 11, 12, 13, 14 and 15.

[31] State Officials' Ex. 12; Ex. 0-11.

[32] Ex. 0-12.

[33] Ex. M-Fed.-18, Appendix p. 6; Ex. M-Fed.-1, attachment to paragraph 22; Ex. M-Fed.-17, Appendix 1, p. 6; Testimony of Richard A. Cox re Waiahole Water System.

[34] Ex. M-Fed.-7.

(M-Fed.-1, Attachment Para. No. 7 and testimony of Richard H. Cox)

37. The taxability as well as severability of privately owned surface water from the land to which it was originally appurtenant was expressly confirmed by the 1913 decision of the Supreme Court in *In Re Taxes, Waiahole Water Co.*, 21 Haw. 679 (1913). The Tax Appeal Court of the State of Hawaii decided that a prior Supreme Court decision that water rights "severed in ownership from the lands can no longer be regarded for purposes of taxation as appurtenant to the lands to which they were originally appurtenant" had not been superseded by the 1932 tax law revision (L.1932 2d, c. 40, § 26; HRS § 246-10); *Re Tax Appeal of L. L. McCandless Trust Estate* (No. 685 in the Tax Appeal Court of the State of Hawaii (1963), unreported, Ex. M-Fed.-1, Attachment Para. No. 10).

38. A basic agreement acknowledging private ownership and right of transportation of major sources of water for the Island of Maui was executed March 18, 1938 ("the 1938 agreement") (see Stipulation, Ex. M-Fed.-1, Para. No. 22 and attachment thereto). The 1938 agreement provided a perpetual arrangement under which water owned by the private owners as well as water leased from public sources originating in the east part of the Island of Maui could be transported for use in the arid plains in the central area of Maui. This was accomplished by the granting by the Territory to East Maui Irrigation of perpetual easements covering its aqueduct and by effecting a permanent agreement as to how the portions of the flow in the aqueduct "which shall be considered the company water" and the portion that is considered "public water" shall bear the expense of upkeep and operation of the aqueduct. All licenses to use public water originating in East Maui that have been issued by the Territory and the State since 1938 have been under that agreement. (Stipulation, Ex. M-Fed.-1)

39. The State in 1970 granted a license to Waiahole Irrigation Company, Limited

31, 2000. This license is for public water to be conveyed through the Waiahole Tunnel to the leeward side of the Island of Oahu and the license refers specifically to the fact that water conveyed by the aqueduct includes "water obtained from sources owned privately" by Waiahole Irrigation Company. (Ex. M-Fed.-1, Para. No. 28 and attachment thereto)

### Purchase, Sale and Lease of Rights to Surface Water by the Government and by Private Persons

40. Since the earliest recognition of private property in Hawaii, rights to surface waters have been bought, sold, leased and otherwise dealt with as other private property. The government has bought and paid for privately owned surface water and all branches of the Hawaiian government have consistently dealt with surface water however owned or acquired by the government in all respects and in the same manner as private persons. (Pl.Ex. 10, p. 4;[28] all exhibits attached to Stipulation, Ex. M-Fed.-1).

41. Major ditch systems have been developed by private owners for transporting water for irrigation on each of the major islands of Hawaii. (These are described generally in the 1917 Federal Government Report, Ex. M-Fed.-2, pp. 74-79, and are brought up to date with some details as to the amounts of surface water delivered in Exs. M-Fed.-14 and M-Fed.-17.) The construction and development of these systems was encouraged by (1) the body of Hawaiian law establishing the private ownership of sur-

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[28] Hutchins, *op. cit. supra*, examined all of the legal material extending up to the year 1946 and concluded: "In Hawaii the right to unused water inheres in the ownership of the original units of lands—ahupuaa and ilis—not in the public; the government holds water rights incident to its lands, *just as does an individual.*" (Pl. Ex. 10 at 47); Ex. M-Fed.-7 (1906 Opinion of Atty. General that *Peck v. Bailey*, *supra*, also applies to sale of government water to be transported for use); Ex. M-Fed.-8 (Opinion of Atty. General

face water and the transportability of all water, however owned, for irrigation,[38] and (2) by statutes authorizing the acquisition of rights of way over both public and private lands for the construction of aqueducts which have been in effect since 1872.

42. The East Kauai Water Company, formed in 1920, has constructed ditches, tunnels and other aqueduct facilities at a cost of up to $1,000,000 for the transport of government water used for irrigation and domestic use.

43. Pioneer Mill Company of the Island of Maui had, in 1917, irrigation equipment including 6½ miles of tunnel for bringing 50,000,000 gallons of water from the mountains. The Territory in the years of 1911, 1915, 1917, 1927, 1940 and 1964 leased and deeded to Pioneer Mill Company reservoir rights, rights of way for irrigation ditches, and

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[38] Hutchins, *op. cit. supra*, (Pl.Ex. 10) summarizes at pp. 17-20 the importance of irrigation to the agriculture of Hawaii and refers to the fact that (p. 17 fn. 42) "the irrigated plantation, having expended large sums per cultivated acre in water development and irrigation facilities, must operate its cane lands under administration in order to obtain the yield and realize the operating economies which are necessary to justify the costs * * *." He also points out that about half of the land that produces sugar cane is under irrigation and that tonnage produced on irrigated plantations represents two-thirds or more of the total sugar crop; that 4,000 tons of water are required on an average to mature the cane for a ton of sugar; that the aggregate investment (undepreciated) in major irrigation works for the service of sugar cane lands exceeded $39,000,000 in 1934—an average of $304.00 per acre. He also points out that the aggregate of proven uses of water extant at the time of the mahele, even if all such uses were converted from taro to sugar irrigation, would have been adequate for only a small fraction of the present acreage in cane irrigated from surface streams. "More water than that covered by ancient, appurtenant rights was required; hence there came to be developed principles related to the use of 'surface water'—meaning the quantity flowing in the stream in excess of that required to satisfy the ancient appurtenant and prescriptive rights attaching to the waters of that stream. (*Id.* at 58)

granted other rights so as to make possible the operation of this extensive irrigation system carrying both publicly and privately owned waters over government lands. (Ex. M-Fed.-2, p. 77; Ex. M-Fed.-18, Appendix 2, p. 9)

44. On the Island of Hawaii, the Hawaiian Irrigation Company leases surface water from the Bishop Museum which it transports over the lower Hamakua Ditch. The construction of this system of tunnels, ditches and flumes to bring water out of Waipio Valley began in 1904 and was completed in 1911 "at a multimillion dollar expense." It transports 26 million gallons of water per day out of the Waipio Valley for a distance of approximately 12 miles through and across more than 50 *ahupuaas* along the coast of the Island of Hawaii.[37] (Ex. M-Fed.-17, p. 4)

45. In 1964 the State leased to Olokele State land in Hanapepe for the purpose of maintaining sugar plantations thereon. (Ex. S.O.-12) Paragraph 8 of the lease reserves all waters, including surface water, to the State, and Paragraph 26 requires that the land shall be used for "intensive agricultural uses." The water brought by Olokele through the Olokele and Koula ditches carrying the private waters owned by G&R and leased to Olokele constitute the *sole* water used in maintaining this irrigated plantation. If this water were not available to Olokele Sugar Company for use in carrying out its contractual obligation to the State, there "could be no Olokele Sugar Company." (Testimony of Roland D. Gerner)

46. On December 23, 1970, the State purchased surface water rights owned by Waiahole Irrigation Company and the deed recites the manner in which such rights were acquired by Waiahole Water Company in 1912 (Ex. M-Fed.-1, Attachment to Para. No. 26). The deed, approved by the

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[37] The history of the ditch is summarised in *Lalakea v. Haw'n Irrig. Co.*, 36 Haw. 692 (1944) which decided that where the ditch company has not exercised the power of eminent domain, it could acquire title to a right of way by adverse possession.

Deputy Attorney General for the State, confirms State recognition (1) that surface water was "originally owned and held by" various private owners and (2) that these rights could be separated from the lands to which they were appurtenant. (Ex. M-Fed.-1, Attachments to Para. No. 26 and Para. Nos. 8 and 9)[28]

47. Both the State and the City and County of Honolulu have repeatedly acquired privately owned surface water rights by suits in condemnation for which payments were made pursuant to statutory requirements. (For example, suits were filed in 1940, 1945, 1946, 1954 and 1966 referred to in Ex. M-Fed.-18, Appendix pp. 12-13)

48. On July 27, 1962 McBryde sold land to the State consisting of portions of three *kuleanas* in Hanapepe, and McBryde reserved to itself all water rights. (Items 26, 27 and 28 in Ex. M-Fed.-1) Other sales of McBryde land to the State with reservation of surface water rights to itself (Items 26, 32 and 39 in Ex. M-Fed.-1) were made of portions of Koloa *kuleanas* purchased by McBryde for its water rights.

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[28] Hutchins discusses the Supreme Court's specific adjudication as to the private ownership of this water as follows: (Plaintiffs' Ex. 10 at 73): "The control of the konohiki over surplus waters was again emphasized in a decision on questions of cotenancy submitted to the supreme court upon an agreed statement of facts. The court stated: [*Foster v. Waiahole Water Co.*, 25 Haw. 726, 734 (1921)]

> The water demised by the Kahana lease is properly termed ahupuaa, konohiki or surplus water and was never appurtenant to any particular part of the land and is thus distinguished from prescriptive or riparian water rights. It is this class of water which originally the chief or konohiki could dispose of at will irrespective of the rights of the other owners and tenants upon or within the ahupuaa in the prescriptive or riparian waters. *Haw'n Com. & Sug. Co.*, 15 Haw. 675."

Other examples of purchases by the government of private surface water in 1904, 1906 and 1939 are described in M-Fed.-18, Appendix, p. 11.

49. The State permitted the owners to reserve their privately owned water rights "vested" in the final order of condemnation in Civil No. 1195, in the Circuit Court of the Second Circuit, being for the purpose of condemning land for the Kahekili Highway, Waihee Bridges and Approaches. The order entered May 19, 1972 excepts from the condemnation

> "those certain water rights vested in Alexander & Baldwin, Inc. . . . and Wailuku Sugar Company . . . by way of Exchange Deed dated June 23, 1924 and recorded in the Bureau of Conveyances in Liber 740, Pages 164-181, and saving and excepting any other water rights of Wailuku Sugar Company in the property sought to be condemned herein, provided however that in developing and maintaining such excepted water rights, neither Wailuku Sugar Company nor its successors or assignees shall disturb the highway to be constructed over said condemned property." (See Ex. M-Fed.-1, Para. No. 27 and attachment)

50. Immediately before statehood, the Hawaii Water Authority (created under the provisions of Act 22, S.L.1957) submitted to the legislature its report on the state of Hawaiian water law. Part 3 (Water Rights) states:

> "*Water Rights and Water Development.* Surface-water rights in Hawaii are considered property rights and can be sold or acquired separately from the land to which they are appurtenant. The legal right in Hawaii to transport surface water from one watershed to another, not permitted under riparian water law, has made it possible to provide irrigation to Hawaii's water-deficient and generally better arable lands and develop a sound agriculural economy. Extensive developments of surface water have been accomplished under Hawaii's existing surface-water rights law. It can be concluded that the many court decisions have firmly established the principles of surface-water rights in Hawaii. It does not seem likely that any legislation enacted to materially alter existing surface-water

rights law would be held constitutional by Hawaii's courts nor does there appear any need at this time for legislation to strengthen or change this system of surface water law." *Water Resources in Hawaii*, Hawaii Water Authority, Mar. 1959, pp. 64-65.[29]

51. The long recognition of separability of water rights is summarized in Hutchins, The Hawaiian System of Water Rights, p. 121, as follows:

> "The water right, while appurtenant to land for the benefit of which the easement exists, is not an inseparable appurtenance. That is to say, it may be severed in ownership from the lands by a separate sale of the water right, after which it cannot be regarded, for purposes of taxation, as appurtenant to such lands; or it may be separately leased; or it may be separated from the lands by prescription."[30]

52. In 1910 the Congress amended Section 55 of the Hawaiian Organic Act to empower the Territorial Legislature to:

> "by general act provide for the condemnation of property for public uses, including the condemnation of rights-of-way for the *transmission of water for irrigation* and other purposes." Act of May 27, 1910, 36 Stat. 443, 48 U.S.C. § 562 (emphasis added).

Pursuant to Congressional authority, the Territorial Legislature in 1911 provided:

> "Corporations organized to develop, store, convey, distribute and transmit water for irrigation, . . . shall

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[29] The Board of Land and Natural Resources charged with the duty of formulating a master plan for the development, conservation and most beneficial use of water resources is given condemnation power to acquire water and water resources and transmission facilities. HRS § 174-1 to 22.

[30] To the same effect is the Report of the Water Commission of the Territory of Hawaii, Honolulu, 1917, pp. 19-20.

> have the right to exercise the power of eminent domain as hereinafter provided. . . .
>
> "Such corporations shall have the right to condemn rights-of-way over lands and property for ditches, tunnels, flumes and pipe-lines necessary or proper for the construction and maintenance of a system for conveying, distributing, and transmitting water for irrigation, fluming, mill use . . . ." Act 124 S.L. 1911 (now § 101-41, 101-42 HRS).

53. At least since 1880 taxing statutes of the Kingdom and succeeding governments have recognized that surface water severed from its land of origin is taxable as property, per se (L.1896, c. 51, § 17; L.1932, 2d, c. 40), and water rights are assessable separately for tax purposes. (*Waiahole* taxes) 21 Haw. 679 (1913), *supra*; (*McCandless* taxes) No. 685, Tax Appeal Court of the State of Hawaii (1963), *supra*; RLH § 246-10(f).

## CONCLUSIONS OF LAW

Plaintiffs have claimed several grounds as entitling them to the relief sought. G&R maintain that federal common law must apply to their claim as against the State authorities because of the federally affirmed decision in *Gay II*. All plaintiffs claim that their rights are protected under 43 U.S.C. § 661.

The two basic grounds of relief urged by the plaintiffs are that they were deprived of their property and their water rights—property rights of great financial value—without either procedural or substantive due process, in violation of the Fourteenth Amendment.

Unquestionably, if the state legislature had enacted a law attempting to accomplish what the Supreme Court did in *McBryde I* the transgression of the due process clause of the Fourteenth Amendment would be obvious. "The violation is none the less clear when that result is accomplished by the state judiciary in the course of [interpreting state law]. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Brinkerhoff-Farris Co. v. Hill,* 281 U.S. 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107 (1930).

At the inception therefore, a determination must be made as to whether plaintiffs' rights were destroyed without due process having been afforded them by the court.

### Procedural Due Process

As appears above and as decried by Justice Marumoto in dissent in *McBryde I,* the effect of the judgment of the Supreme Court was to deprive the plaintiffs of their property, water and water rights, without affording any of them an opportunity to be heard in their defense. The state court violated not only its own rules, but the state law as well, by deciding the case on issues that were never raised or argued.

Thereafter on the almost farcical "rehearing", although the due process issues were urged by the plaintiffs, the court refused to permit argument thereon or consider the same. Rather, the court extended a clearly pro forma invitation to the plaintiffs to "prove to us why we were wrong" on issues and conclusions assumed sua sponte and decided sua sponte by the court.

On this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the State on a silver platter without even a request by the State for the gift.

A ruling on this ground only, however, would not go to the merits of plaintiffs' claims.

### Federal Common Law

G&R has argued that the federal common law must be applied to their own claim of water rights, since those rights were determined by a federal court in *Gay II*. This position evidences an attempt to extend *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), and *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), to G&R's federally affirmed rights. Any such extension has been curtailed by *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), which specifically overruled *Bonelli* and, according to Justice Marshall in dissent, foretold the overruling of *Hughes*.

The factual problems of land boundaries along navigable waters, upon which the above cases were so narrowly focused, is not here in question. The title of plaintiffs to their respective riparian lands and water rights perforce came to them through the Kingdom, via the mahele. No rights were acquired from the United States following annexation. As pointed out in *Oregon v. Corvallis Sand & Gravel, supra,* once the title to land shall have passed into private hands and become vested under United States law, then, upon statehood, that property, like all other property in the state, is subject to state legislation. To hold otherwise would negate the equal footing doctrine.

### Federal Rights Under 43 U.S.C. § 661

Plaintiffs have urged that 43 U.S.C. § 661[31] gives federal protection to them as possessors and owners of vested water rights under recognized customs, laws and decisions of the courts of Hawaii. Section 611 applies only to "public lands" of the United States. Upon annexation all government lands of the Republic, including the "crown lands", became the property of the United States and thus "public lands." See *U. S. v. Fullard-Leo,* 331 U.S. 256, 269, 67 S.Ct. 1287, 91 L.Ed. 1474 (1947). Those "public lands" of the United States, however, were never subject to sale or disposal under general federal law. By §§ 73, 91 and 99 of the Organic Act,[32] all those lands (with certain named exceptions) were entrusted to and became "public lands" of the Territory of Hawaii and "the laws of Hawaii relating to public lands * * * shall continue in force." (§ 73(c)) Thus § 661 had never any application to the "public lands" of Hawaii, nor to plaintiffs' water rights.

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[31] § 661. Appropriation of waters on public lands; rights-of-way for canals and ditches

> "Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; * * *."

Small Owners Trial Brief, Appendix 13.

## Vested Rights

By the Organic Act, §§ 1, 5, 6, 7 and 10, the laws of Hawaii, as they existed under the Republic of Hawaii were continued on in full force and effect, unless inconsistent with the Constitution and laws of the United States, or the provisions of the Act. By the Admission Act,[33] the State succeeded to the title which the Territory had to its public lands (§ 5) and all Territorial laws were continued in force (§ 15). After the mahele, the lands involved here were and are private, and until *McBryde I,* rights to surface waters, unquestionably, went with the land. Neither under Annexation nor Statehood were any rights of private property curtailed, let alone summarily taken away, by or for either the United States, the Territory or the State. Only the Supreme Court of Hawaii, by *McBryde I* and *McBryde II,* undertook to do that—and without compensating the owners thereof.

As is manifest from the above, from the very beginning of Hawaiian law on waters, and for over 100 years thereafter, water rights were severable from the land to which such rights were appurtenant and surface water was held to be freely transportable out of its watershed. The rights of owners along a stream were far more than mere riparian rights under the English common law. "Their right is to divert and consume—not merely to use and return." *Carter v. Territory,* 24 Haw. 47, 61 (1917).

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[32] Act of April 30, 1900, c. 339, 31 Stat. 141.

[33] Act of March 18, 1959, P.L. 86-3, 73 Stat. 4.

Congress as well as the Territory and State, by giving the power of condemnation of rights-of-way to private corporations for ditches, flumes, etc., for irrigation, fluming and mill uses, encouraged and facilitated the diversion and transporting of water out of its watershed.

From the days of the Kingdom until even now, the governments of Hawaii have taxed severed water rights, as such, or have provided that water privileges, availability of water, and its costs are factors to be considered in fixing land values. Lands with severed water rights, even after *McBryde II*, are taxed for land value only, *i. e.*, as if without water.

The several governments of Hawaii have purchased surface water from private owners, have condemned private water rights, have sold and exchanged lands, with water rights reserved to private owners and have granted easements for ditches and pipelines to transport water across government lands.

By the terms of sugar cane leases of government land, as well as other leases, such as to some of the Small Owners, in order to carry out the provisions of the lease regarding the crops to be grown, the private lessees are forced to transport privately owned surface water on to the government land. The leases were entered into upon reliance by the State as well as the lessees of the well established law of water as it was known and accepted by all, including the State, before *McBryde I.*

As indicated, there has been a continuous government policy to encourage the transport of water for private economic use.

On Kauai, Oahu and Maui, the great majority of the sugar cane lands are irrigated lands, and on the island of Hawaii three (formerly four) plantations are irrigated. The "irrigated" sugar plantations have millions of dollars invested in tunnels, dams, ditches and pipe, for transporting water out of its watershed.

Under the "new law" of *McBryde I*, Olokele and McBryde, *certainly*, and other plantations also, would be put out of business and G&R's lands would be reduced from high value cane lands to low value pasture lands, *i. e.*, worth only one-third to one-tenth of cane land. The employment of many hundreds of workers on sugar plantations would be jeopardized.[24]

Without delving into all of the legal ramifications of *Gay II*, it can be said with certainty that thereby:

(1) G&R were declared to be the owners of the *ilis kupono* of Koula and Manuahi.

(2) The common law doctrine of riparian rights (as now decreed by *McBryde I*) "save only as to one feature of the *Carter* case, that relating to freshet waters, it is not and never has been the law of Hawaii." *Gay II*, 31 Haw. at 396.

(3) There is normally a surplus of water flowing in the River over and above the quantity required to satisfy the

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[24] Although not mentioned by the State attorney general in the State's trial brief, the vesting by *McBryde I* of all surface water rights in the State, subject only to the appurtenant common law riparian rights of those lands along a stream, would not automatically give to the State the right to sell any such waters for transport outside a watershed. *McBryde I* gave to each owner of riparian lands "the right to the natural flow of the stream without substantial diminution and in shape and size given it by nature." *McBryde I*, 54 Haw. at 198, 504 P.2d at 1344. Another of the hydra-headed problems created by *McBryde I* would be the impact of NEPA upon any attempted diversion of surface waters by the State after riparian rights are taken care of, or even when the State owns all of the lands along a stream.

prescriptive and appurtenant needs and rights of certain lower *kuleanas* and other lands of the *ahupuaa* of Hanapepe.

(4) Originally the King was the sole owner of waters and the lands and he "could do with either or both as he pleased. * * * [N]o limitation * * * ever existed or was supposed to exist to his power to use the surplus waters as he saw fit." And citing *Peck v. Bailey, supra,* 8 Haw. 658: "If any of the lands [conveyed by the King or awarded by the Land Commission] were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance." *Gay II,* 31 Haw. at 385-86. "The water appurtenant to each land belonged to the owner of the land and was severable therefrom and was transferable either with or without grant to other lands irrespective of whether such other lands were riparian or nonriparian (provided only that no injury was by the diversion made to the rights to other lands)." *Id.* 31 Haw at 400.

(5) G&R as the owners of the *ilis kupono* were the owners of the streams originating on the above *ilis* and are therefore entitled to use and divert such waters thereof as they see fit, after leaving in the streams "the quantity required to satisfy the needs of certain lower kuleanas and other lands in the ahupuaa of Hanapepe which have become entitled to water by prescription or to which water rights were appurtenant at the time when land commission awards thereof were made." *Id.* 31 Haw. at 382. These lands would be the lands of the State, McBryde and Small Owners. As owners of the *ilis kupono,* G&R were owners of the normal surplus waters of the two streams and could divert and transfer the normal surplus as G&R pleased.

(6) G&R's water rights have financial value. *Id.* 31 Haw. at 401.

### Substantive Due Process

As preceding analysis makes manifest, Hawaii's water rights law was, generally, well settled and stable prior to *McBryde I.* The right to appurtenant waters was conveyed with the lands awarded under the mahele. The awardees of the *ahupuaas* and *ilis kupono* were given the same rights of control of the waters arising thereon as had the King. The right to take and divert surface water out of the watershed was unquestioned, even by the State. Water rights were severable from the land, at a price. The English common law doctrine of riparian rights was *not* the law in Hawaii. Hawaii Supreme Court decision after decision had established the above rules of law.

*McBryde I* therefore came as a shocking, violent deviation from the solidly established case law—totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions.

Based upon well settled law, the State, the plaintiffs, and many others in the same class as the plaintiffs had spent millions of dollars in dams, ditches, pump equipment, plantations, mills and farms, to utilize the surface waters of Hawaii. Some of the plaintiffs had entered into contracts, some into contracts with the State, which compelled them to use diverted water to fulfill those contracts.

It had been decided in *Gay II* that G&R had certain rights to surplus water, superior to the State, a decision to which the State's predecessor in title, the Territory of Hawaii, was a party. Yet by *McBryde I,* that decision was reduced to an empty husk—the court grudgingly giving lip service to the doctrine of res judicata, *McBryde I,* 54 Haw. at 179, 504 P.2d 1330, and then rendering it meaningless by saying in effect: You won the judgment in *Gay II* but

> "by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good. Therefore, we held that as between the State and McBryde, and between McBryde and Gay & Robinson, the State is the owner of the water in the Koula Stream and Hanapepe River." *Id.* at 186, 504 P.2d at 1339.

Thus, no longer are there any "surplus waters"! The only water rights remaining to G&R out of *Gay II* are those appurtenant to the land, based on the taro grown thereon at the time of the mahele, and G&R cannot divert even that out of the watershed! So spake the court.

The doctrine of res judicata may not so blithely be emasculated—and absolutely not upon the precedential authority of the four cases cited by the majority in *McBryde I* at 178, 504 P.2d 1330; *Greenfield v. Mather*, 32 Cal.2d 23, 194 P.2d 1 (1948); *Universal Const. Co. v. City of Fort Lauderdale*, 68 So.2d 366 (Fla.1953); *People v. Somerville*, 42 Ill.2d 1, 245 N.E.2d 461 (1969); *Motor Vehicle Accident Indemnification Corp. v. National Grange Mutual Ins. Co.*, 19 N.Y.2d 115, 278 N.Y.S.2d 367, 224 N.E.2d 869 (1967). Each and every one were "special situation" cases in which each court considered deviation from applying the doctrine of res judicata on the catchall grounds of "avoiding manifest injustice" or "fundamental fairness." The facts in each and all of the four are not even remotely similar to those in *Gay II*.[88] In *Gay II* the Territory, the State's

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[88] *Cf. Lester v. National Broadcasting Company*, 217 F.2d 399 (9th Cir. 1955); *Parker v. Westover*, 221 F.2d 603 (9th Cir. 1955); *Flynn v. State Board of Chiropractic Examiners*, 418 F.2d 668 (9th Cir. 1969).

The State has called this court's attention to *Scoggin v. Schrunk*, 522 F.2d 436, 437 (1975), wherein the Court of Appeals of the Ninth Circuit stated:

> "It is now established that where the federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same, res judicata will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief."

That rule is founded on the assumption that plaintiffs' state and predecessor in title, sought an injunction to restrain G&R from diverting surplus waters of the River from the valley of Koula to the arid lands of Makaweli. The underlying problem was who owned the surplus water. The trial judge, a majority of the Territorial Supreme Court and the Court of Appeals of the Ninth Circuit all said G&R had title to and owned the surplus waters it was diverting. The injunction was denied. It was decreed that G&R owned and had a right to divert those waters.

That judgment between the same parties deciding the ownership and right to divert the surplus waters of the River binds even the Supreme Court of Hawaii. The pronunciamento of the Supreme Court in *McBryde I* cannot foreclose G&R from taking and diverting those litigated waters—even if pursuant to *McBryde I* the State *did* have title to all the waters of the River! The valid and final judgment in *Gay II* operates as an absolute bar to any claim on the part of the State to the title to or right of diversion of the waters in question, regardless of whether or not the court in *McBryde I* was correct in holding that the State always has and now does own those waters. *Filice v. U. S.*, 271 F.2d 782 (9th Cir. 1959), *cert. denied*, 362 U.S. 924, 80 S.Ct. 677, 4 L.Ed.2d 742 (1960); *Lawlor v. National Screen Service*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

Apart from the above, the underlying question to be determined is whether each and every plaintiff has had property taken by the State, via judicial decision, and the State has so "taken" it without paying the plaintiffs for that property.

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federal actions are based on the same claimed wrong. *Flynn*, *supra*. As fully set out heretofore, plaintiffs claimed wrong in this federal action was not within any of the issues raised and tried by the Fifth Circuit. No party including the State could have anticipated what the Supreme Court did, sua sponte. See n. 14, *supra*. The Supreme Court refused to allow plaintiffs to argue the constitutional issues raised by this federal action. The *Scoggin* case is inapposite.

It is axiomatic that the law of real property is left to the states to develop and administer. Hawaii, like every other state, may by its legislature or its courts make changes in its real property laws, including laws governing property rights of riparian land owners in and to the use of waters flowing along their lands.[38] Underlying the right of the courts and legislature to make changes in the law, however, is the concomitant obligation of the State to compensate those whose property may have been taken over by the State by those changes. *Chicago, Burlington &c. R'D v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Even by legislative fiat, property cannot be expropriated and taken over by the State without compensating the private owner for his lost rights. No more can private property be so taken away by judicial decision and handed over, gratis, to the State. "The touchstone of due process is the protection of the individual against arbitrary action of the government." *Wolff v. McDonnell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935. As pointed out by Justice Stewart in *Hughes, supra,* 389 U.S. at 297, 88 S.Ct. 438, if it is determined that the plaintiffs here and not the State owned certain water rights prior to *McBryde I,* then unless the decision in *McBryde I* could have reasonably been expected, that decision cannot be accepted as a conclusive statement of the applicable law.

As indicated above, the decision made an unsolicited and unexpected gift to the State of all of the waters in all of the streams and to the complete surprise of all parties, said that the State had *always* owned the waters. There was no precedent for this determination. The court had to toss aside as dicta all of the mass of prior decisions to the contrary, turn its then blind eyes toward the rule of stare decisis, tear apart the doctrine of res judicata, and discover completely new meanings in ambiguous Hawaiian words and phrases used a century before in order to change the law of water rights and gift wrap the waters for the State.

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[38] *Cf. In Re Application of Sanborn,* 57 Haw. ——, 562 P.2d 771 (1977); *In Re Application of Ashford,* 50 Haw. 314, 440 P.2d 76 (1938); *Baumann v. Smrha,* 145 F.Supp. 617 (D.Kan.1956), *aff'd,* 352 U.S. 863, 77 S.Ct. 96, 1 L.Ed.2d 73 (1956).

> "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes* 389 U.S. at 296-97, 88 S.Ct. at 442.

*McBryde I* did just that; its construction and interpretation of the meaning of the phrase "To encourage and even to enforce the usufruct of lands for the common good" in the 1846 Principles to mean that the King thereby retained title to all waters then used for agricultural or domestic purposes, and its cavalier assertation that because the missionaries came from Massachusetts, § 7 of the Laws of 1850 codified the English common law doctrine of riparian rights, most certainly effected an unforeseeable change in Hawaii's water rights laws as theretofore expounded in over 100 years of prior Hawaii Supreme Court opinions.

By *McBryde I* every person who had been led to believe they had clearly defined and well established water rights and uses of surface waters found that those water rights were declared by the court to belong to the State as part of the public domain, and that the use of any waters which might be appurtenant to any of their riparian lands was limited to and on that property only.

It may be that the cout did not conceive its action as a taking—it said the plaintiffs never *had had* any such water rights, ergo, no taking! Just that simple!

The Constitution does not measure the taking of property by what a court may say or even what it may intend; the measure is by the result. For over a century neither the State nor its predecessors in title ever attempted to take water rights without either purchase or condemnation, but *McBryde I* took the plaintiffs' water rights for the State

> "by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. * * * [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate. * * *" *Hughes,* 389 U.S. at 298, 88 S.Ct. at 443.

This retroactive taking of private property for and by the State, without payment therefore, was clearly the result of "perverse reading of prior law" as inferentially condemned in *O'Neil v. Northern Colorado Irrigation Co.,* 242 U.S. 20, 26, 37 S.Ct. 7, 61 L.Ed. 123 (1916), and in contravention of the principles laid down in *Muhlker v. New York & Harlem R.R.,* 197 U.S. 544, 25 S.Ct. 522, 49 L.Ed. 872 (1905). Even though the court may be motivated to act because the justices thought it was for the best interest of Hawaii that surplus water be publicly owned and and that the rivers should flow, undiminished, to the sea, the court could not and cannot take away the private property of the plaintiffs without paying them for it. The Fourteenth Amendment so commands.

Those portions of *McBryde I* and *II* holding that the State owns all surplus water and, under the aegis of the English common law doctrine of riparian rights, restraining the free diversion of surface waters for use outside the lands of the plaintiffs to which they are appurtenant, must be declared untenable and void.

The injunction prayed for by the plaintiffs must be and is GRANTED.

The preceding ruling of this court, of course, does not disturb the findings of the state trial court regarding appurtenant water rights as affirmed in *McBryde I* 54 Haw. at 189, 504 P.2d 1330. Neither is *McBryde I*'s reversal, at 190, 504 P.2d 1330, of the trial court's finding anent G&R's claim of appurtenant water rights to 90 acres of Koula and Manuahi affected hereby.

## Prescriptive Rights

The problem of McBryde's cross claim for prescriptive rights to 2,084,600 gallons per day of normal surplus water against G&R must still remain unsolved. The majority (then including Justice Levinson) in *McBryde I* were apparently too concerned with the public policy aspects of their opinion to give the question of prescriptive rights the attention it deserved. *McBryde I's* reasoning is both confusing and ambiguous. While it held that the trial court was in error in deducting McBryde's "prescription right to water" from G&R, "*if* McBryde had been prescribing * * * water", the actual basis for that holding was that McBryde had been taking that water out of the State's quota of water—against which prescription could not run—then concluded that the trial court should not have imposed "a *double* burden on" G&R by charging that amount against G&R's waters. *McBryde I* at 198, 504 P.2d 1330. (emphasis added). Just how this would have imposed a *double* burden on G&R is not apparent to this court. The opinion engendered further confusion by continuing: "However, the issue is academic now since under our holding" that the State owned the waters of the River "as between McBryde and the State, McBryde acquired no prescriptive right to water." *Id.* at 198, 504 P.2d at 1345.

Since the Supreme Court's belief that the trial court was in error was conditional: "*if* McBryde had been prescribing * * * water," inferentially from the State, it would appear that all the court actually held was that McBryde could not get prescriptive rights against the State.

Of course, this was never McBryde's claim. McBryde had always claimed that its prescriptive rights ran against G&R, that until G&R refined and tightened up its upstream waters and diversion systems, there was enough water coming downstream to supply *both* the State *and* McBryde with their respective quotas of appurtenant and prescriptive waters.

Justice Marumoto in *McBryde I* and joined by Justice Levinson in *McBryde II,* simplistically ruled that since

"McBryde's intake points are below the diversion point of G&R", it gained no prescriptive rights against G&R because "adverse use does not run upstream." *McBryde-I* at 205, 504 P.2d at 1348; *McBryde II*, 55 Haw. at 304, 517 P.2d 26.

Neither the majority nor the minority apparently considered the statement in *Gay II*, from which springs G&R's rights to surplus water: "In this court the parties *agreed* that there is normally a surplus of water flowing in the stream *over and above* the quantity required to satisfy the needs of * * * lower kuleanas and other lands in the ahupuaa of Hanapepe *which have become entitled to water by prescription* or to which water rights were appurtenant at the time when the land commission awards thereof were made." *Gay II* 31 Haw. at 382 (emphasis added).

Thus *Gay II preserved* to those water users below G&R's intake whatever prescriptive rights to water they may have acquired prior thereto. All prior water rights law recognized the same basic principle. The term "normal surplus" was based on that premise. It would appear therefore that the Utah and Oregon cases cited by Justice Marumoto are inapposite in the light of well settled Hawaiian law that downstream owners may acquire rights by adverse use against an upstream owner who never uses them during the whole period. *Lonoaea v. Wailuku Sugar So., supra,* 9 Haw. n. 7, at 662-64; *Palolo Land & Imp. Co. v. Wong Quai, supra,* 15 Haw. n. 7, at 560-62; Hutchins, The Hawaiian System of Water Rights at 113-14.

Inasmuch as this court finds the language and rationale of *McBryde I* and *II* certainly so ambiguous and definitely insupportable as therein expressed, this court cannot positively conclude that a federal question is involved and therefore without prejudice to the claims of either G&R or McBryde, leaves the ultimate determination of their prescriptive rights claims to the Fifth Circuit Court sitting as statutory Water Commissioner, and exercising the jurisdiction that was retained by the judgment.

### Storm and Freshet Waters

The problem of storm and freshet waters likewise must be left to the Fifth Circuit Court sitting as Water Commissioner. The majority reversed the trial court's award of all storm and freshet surplus waters and overruled *Carter* by stating again that the State owned all surplus water subject to common law riparian rights: "Thus 'storm and freshet' water is the property of the State and we overrule *Carter v. Hawaii*, 24 Haw. 47 (1971)." *McBryde I*, 54 Haw. at 200, 504 P.2d at 1345. The minority would have affirmed *Carter*.

This court having destroyed the basis for the majority's conclusions leaves the issue of "storm and freshet" waters to the trial court.

Plaintiffs will prepare the necessary order.

# APPENDIX D

## ORDERS OF THE SUPREME COURT OF THE UNITED STATES

UNITED STATES REPORTS

Volume 417

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1973

May 20 (concluded) Through (in part) June 24, 1974

HENRY PUTZEL, jr.
Reporter of Decisions

[Page 962]

No. 73-1440. McBRYDE SUGAR CO., LTD., ET AL. v. HAWAII ET AL. Appeal from Sup. Ct. Hawaii dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 Haw. 174, 504 P. 2d 1330.

[Page 976]

No. 73-1441. ROBINSON ET AL. v. HAWAII ET AL.; and
No. 73-1442. ALBARADO ET AL. v. HAWAII ET AL. Sup. Ct. Hawaii. Motion of Hawaiian Sugar Planters Assn. for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 54 Haw. 174, 504 P. 2d 1330 and 55 Haw. 260, 517 P. 2d 26.

# APPENDIX E

## OPINION OF THE SUPREME COURT OF HAWAII DATED DECEMBER 20, 1973

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee, v.* AYLMER F. ROBINSON, *et al., Defendants-Appellees, Cross-Appellants.*

No. 4879

APPEAL FROM FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, JUDGE
ON REHEARING

DECEMBER 20, 1973

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON, JJ., AND CIRCUIT JUDGE OGATA IN PLACE OF KOBAYASHI, J., DISQUALIFIED

*Per Curiam.* Subsequent to the filing of the decision in this case on January 10, 1973 (54 Haw. 174, 504 P.2d 1330 (1973)), petitions for rehearing were filed by some of the parties. By order of this court dated June 18, 1973, all the parties were requested to file supplementary briefs directed to the issues (1) whether HRS § 7-1 [1] was material to the determination of the water rights of the parties, and (2) whether owners of parcels of land in the Hanapepe Valley, who were entitled to appurtenant water rights for taro raising at the time of the Mahele or the Land Commission Award, were entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant.

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[1] The pertinent portion of HRS § 7-1 reads:

> ". . . . The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."

Arguments of the parties were heard at the rehearing had on September 18, 1973. After careful consideration of the briefs and arguments presented at the rehearing, we find no reason to change the decision filed herein.

*J. Russell Cades* and *Robert B. Bunn* (*Cades, Schutte, Fleming & Wright* of counsel) for McBryde Sugar Co., Ltd., plaintiff-appellant, cross-appellee.

*John H. R. Plews* (*Anthony, Hoddick, Reinwald & O'Connor* of counsel) for Selwyn A. Robinson, et al., defendants-appellees, cross-appellants.

*Andrew S. O. Lee*, Deputy Attorney General (*George Pai*, Attorney General, of counsel) for State of Hawaii, defendant-appellee, cross-appellant.

*William F. Quinn* (*Goodsill, Anderson & Quinn* of counsel) for Olokele Sugar Co., Ltd., defendant.

*Clinton Shiraishi* (*Shiraishi & Yamada* of counsel) for Ida Albarado, et al., petitioners.

## DISSENTING OPINION OF MARUMOTO, J.

This phase of the case is limited to two points mentioned in the foregoing per curiam, the points being: first, whether HRS § 7-1 was material to the determination of the water rights of the parties, and, second, whether the landowners in Hanapepe Valley, who were entitled to appurtenant water rights, had the right to divert such appurtenant water to watersheds beyond the Hanapepe Valley.

I discussed my view on the second point in my dissent reported at 54 Haw. 201, 504 P.2d 1356, and it is the view presented in the supplementary briefs with more elaboration.

I did not discuss the first point in my dissent, for the reason that I did not think that it was an issue on appeal. However, assuming that it was a proper issue on appeal, I think that HRS § 7-1 does not support the holding of the court in Part II of the opinion of the court at 54 Haw. 180, 504 P.2d 1335, that it reserved the title to flowing water to the State for the common good. On the point, I concur in the historical analysis in the dissenting opinion of Mr. Justice Levinson.

## DISSENTING OPINION OF LEVINSON, J.

Although I voted with the majority of this court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973) [hereinafter referred to as *McBryde I*], I am constrained to recant that position in view of my current understanding of the problems of this case. In light of the arguments adduced on rehearing, historical evidence discovered upon further research subsequent to the court's previous decision in this case, and a reappraisal of the reasoning supporting that decision, it is my opinion that the court committed error in holding that all surplus water belongs to the State and that private water rights, however acquired, may not be transferred to nonappurtenant land. Because of the importance of this case to the development of the law on the subject of Hawaii's water resources, I have undertaken to present a detailed analysis explaining why *McBryde I* is not in keeping with long established and unique principles of Hawaiian water law. Precisely because *McBryde I* is such a radical departure from these principles as they have been heretofore understood, moreover, I have concluded that *McBryde I* effectuates an unconstitutional taking of the appellant's and cross-appellants' property without just compensation and should be reversed on this ground as well.

As Mr. Justice Frankfurter stated in his famous dissenting opinion in *Henslee v. Union Planters National Bank*, 335 U.S. 595, 600 (1949): "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." I regret that the wisdom to correct the errors of *McBryde I* has not come to a majority of this court in time to restore continuity to the body of water law that has evolved in Hawaii over the course of more than a century.

### I. The Background of the Controversy

This case arises out of a controversy among owners of land located in the Hanapepe Valley on the island of Kauai respecting their relative rights in the surface waters of the valley.[1] The action commenced on March 24, 1959, when a complaint was filed by McBryde Sugar Company, Limited, hereinafter referred to as McBryde, the owner of the *ilis kupono*[2] of Eleele and Kuiloa, situated in the southeastern

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[1] The uncontested findings of the trial judge below, sitting as Commissioner of Private Ways and Water Rights under HRS §§ 664-31 to 37, as to the nature of surface waters in the Hanapepe Valley were as follows:

> The watershed of the Hanapepe River is about fifteen miles long and from two to five miles in width. At the upper or north portion the annual rainfall is between 400 and 500 inches. The annual rainfall decreases as the valley goes toward the sea, and at the sea the rainfall is comparatively negligible. The Koula stream joins the Manuahi stream about halfway to the sea to form the Hanapepe River.

McBryde Sugar Co. v. Robinson, S.P. No. 108, Decision at 4 (5th Cir. Ct. of Hawaii, December 10, 1968).

[2] The Hawaiian terms *ili kupono*, *ili*, *ahupuaa* and *kuleana* are peculiar to the ancient Hawaiian system of land tenure and were explained as follows in Territory v. Bishop Trust Co., 41 Haw. 358, 361-62 (1956):

> [U]nder the ancient Hawaiian system all land belonged to the king or ruling chief who allotted tracts of lands from time to time to the principal chiefs, subject to revocation at will; upon the death of the king each principal chief derived his lands anew, gave them out to an inferior order of chiefs or first of

portion of the valley. The defendants fell into three categories: (1) the Territory (now the State) of Hawaii, the owner of the *ahupuaa* of Hanapepe, located in the southwestern portion of the valley; (2) the partnership of Gay and Robinson and its individual partners, hereinafter referred to as Gay and Robinson, owners of the *ilis kupono* of Manuahi and Koula, located in the northwestern and

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> rank, by whom they were subdivided again and again from the king down to the lowest class of tenants.
>
> The unit of land was the *ahupuaa*, usually running from the mountains to the sea. Within the *ahupuaa* were a number of subdivisions, each of which was called an *ili* [or *ili* of the *ahupuaa*]. This division was for the convenience of the chief, administered by a *konohiki* or agent appointed by the chief. (It is only in the later statutes that the chiefs or landlords are referred to as *konohikis*.) It had no existence separate from that of the *ahupuaa*, except the so-called *ili ku* [*ili kupono*] or independent *ili*, although the independent *ili* paid tribute to the king. There were also *kuleanas*, meaning a tract of land within the larger tract. The term *kuleana* originally referred to a right of property in any business or other matter but afterwards was applied to the land holding of the tenant or *hoaaina* residing in the *ahupuaa*.

*See generally* J. CHINEN, THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848, at 1-8 (1958); W. HUTCHINS, THE HAWAIIAN SYSTEM OF WATER RIGHTS 39-42 (1946) [hereinafter cited as HUTCHINS].

On the facts of this case, although it is possible that the *konohiki* of the *ahupuaa* of Hanapepe exercised plenary control over the entire Hanapepe Valley in ancient times, at some point in history the king created fully independent *ilis kupono* within the geographical boundaries of the *ahupuaa*. These *ilis kupono* were of equal rank and dignity with the *ahupuaa* from which they were created, and upon their *konohikis* devolved all the rights and appurtenances customarily associated with the stewardship of such land units on behalf of the king. *See* Territory v. Gay, 31 Haw. 376, 378-81 (1930), *aff'd*, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931).

northeastern portions of the valley, respectively, and; (3) all other owners of the lands in the Hanapepe Valley, hereinafter referred to as Small Owners.

The two principal users of water in the Hanapepe Valley are McBryde and Gay and Robinson, both of which for a long period of time have availed themselves of substantial amounts of the surface waters of the valley for sugar cane irrigation both within and without the Hanapepe watershed.[3] The instant controversy was kindled in 1949 when Gay and Robinson implemented a greatly improved ditch and tunnel system for the transportation of water for irrigation purposes to the lands at Makaweli, a substantial portion of which is cultivated by the Olokele Sugar Company, outside and to the west of the Hanapepe watershed. Although this system enabled Gay and Robinson to appropriate significantly increased amounts of water from the Koula stream, such an increase was to the detriment of downstream landowners such as McBryde who thereafter were unable to take from the Hanapepe River the amount of water they had theretofore been taking.

After an exhaustive trial on the merits, on January 30, 1969 the trial court filed amendments to its decision of December 10, 1968 delineating the rights of the parties with respect to appurtenant water,[4] prescriptive

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[3] The evidence showed that McBryde had been appropriating water for irrigation at least since 1934, *see* McBryde Sugar Co. v. Robinson, S.P. No. 108, Decision at 11-12 (5th Cir. Ct. of Hawaii, December 10, 1968), and that Gay and Robinson had been doing so since 1891. *See id.* at 6-7. *See also* Territory v. Gay, 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931), *aff'g* 31 Haw. 376 (1930).

[4] Appurtenant water rights have been defined as follows:

> Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic pur-

water,[5] normal surplus water,[6] and storm and freshet surplus water[7] in the Hanapepe Valley. The trial court's process of reasoning and conclusions in this regard are reported in *McBryde Sugar Co. v. Robinson*, *supra*, at 176-77, 504 P.2d at 1333-34. Integral to the trial court's judgment were two principles of Hawaiian water law, which it considered to be solidly bottomed in Hawaiian judicial precedent and which were unquestioned by any of the parties: (1) that all normal surplus water belongs to the *konohiki* of the *ahupuaa* or *ili kupono* on which it originates, *see, e.g.*, *Territory v. Gay*, 31 Haw. 376, 387-88 (1930), and; (2) that water rights however acquired are freely transferable to any land within or without the watershed on which they arose, so long as the water rights of others are not thereby

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> poses, that land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named.

Territory v. Gay, 31 Haw. 376, 383 (1930).

[5] As stated by Mr. Hutchins:

> In order to establish a prescriptive title to a water right, there must have been an "actual, open, notorious, continuous and hostile use" of the water for the statutory period of limitations [(20 years), and t]he use must also have been made under a claim of right.

Hutchins 111; *see* Territory v. Gay, 31 Haw. 376, 383 (1930); Kohala Sugar Co. v. Wight, 11 Haw. 644, 648-50 (1899).

[6] Normal surplus water is all water in a stream or river "not required for the satisfaction of . . . prescriptive or . . . appurtenant rights," Territory v. Gay, 31 Haw. 376, 384 (1930), excluding only storm and freshet water as defined in note 7 *infra*.

[7] Storm and freshet surplus water is that amount of water above the normal flow of a stream or river which is intermittently caused by storm precipitation. *See* Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680 (1904); Hutchins 74-77.

deleteriously affected. *See, e.g., Wong Leong v. Irwin*, 10 Haw. 265, 270-72 (1896).

On appeal to this court by McBryde, the State, and Gay and Robinson, many issues were raised, including among other things, the correctness of the trial court's adjudications of the quantum of appurtenant water rights of the parties, the amount of water, if any, to which McBryde was entitled by prescriptive use, and the proper disposition of storm and freshet surplus water. This court upheld the findings of the trial court with respect to the amount of appurtenant water belonging to the State, McBryde, and the Small Owners, *McBryde Sugar Co. v. Robinson, supra* at 187-89, 504 P.2d at 1339-40, and affirmed in part and reversed in part the findings of the trial court as to the amount of appurtenant water to which Gay and Robinson was entitled. *Id.* at 189-90, 504 P.2d at 1340. This court also reversed the finding below that McBryde had acquired title to over two million gallons of water per day by prescriptive use. *Id.* at 198, 504 P.2d at 1344-45.

At this point, however, this court departed radically in two major respects from the reasoning of the trial court and the positions taken by the various parties. First, it held that all surplus water in the State, including normal and storm and fresh surpluses,[8] is the property of the State and not the property of the *konohiki* of the *ahupuaa* or *ili kupono* on which the water originates. *Id.* at 180-87, 504 P.2d at 1335-39. This holding was grounded entirely on a specific portion of the Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, adopted by the Land Commission on August 20, 1846 and approved by resolution in the Legislative Council on October 26, 1846, RLH 1925, Vol. II, 2124, 2128 (originally enacted as L. 1847, at 81, 85) [hereinafter cited as Land Commission Principles], which announced that the Mahele left unimpaired the king's power "[t]o encourage and even to enforce the usufruct of lands for the common good."[9] This provision, it was held, reserved to the king and, through subsequent governments, to the State, the control of all surplus surface waters in Hawaii for the common welfare of the Hawaiian people.

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[8] *See* notes 6 and 7 *supra*.

Second, this court held that section 7 of the Enactment of Further Principles, originally published as L. 1850, § 7, at 202, and presently compiled in HRS § 7-1,[10] codified the doctrine of riparianism as it existed in Massachusetts and

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[9] The court stated:

> The principles specifically and most emphatically indicated that the Land Commission was only authorized to convey certain of the King's rights in land which had been bestowed upon individuals by him, to wit:
>
> > "[H]is private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands are the following:
> >
> > * * * *
> >
> > "3rd. To encourage and even to enforce the usufruct of lands for the common good * * *."
> >
> > * * * *
> >
> > "These prerogatives, power and duties, his Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board and titles consequent upon them must be understood subject to these conditions." L. 1847, 85; RLH 1925, Vol. II, p. 2124, 2128.

54 Haw. at 185-86, 504 P.2d at 1338.

[10] That section provides:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. *The people shall also have a right to drinking water, and running water,* and the right of way. *The springs of water, running water, and*

England in the mid-nineteenth century, and that under that doctrine water rights acquired by virtue of ownership of lands along the bank (*ripa*) of a stream or river were appurtenant exclusively to those parcels of land and could not be transferred to remote parcels. 54 Haw. at 191-98, 504 P.2d at 1341-44.

Because the above two principles, if correct, would have precipitated a revolutionary change in the Hawaiian system of water rights as it has been understood heretofore, see HUTCHINS *passim*, the court decided that additional enlightenment with respect to its further adherence to them would be helpful. Accordingly, the court granted the petitions for rehearing sought by McBryde, Gay and Robinson and the Small Owners, and centered the inquiry around the following issues:

> 1. The pertinent portion of HRS § 7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:
>
> > "The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."
>
> Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?
>
> 2. The parties in this action introduced evidence, as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water

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> *roads shall be free to all, on all lands granted in fee simple;* provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

(Emphasis added).

rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant?

## II. The Ownership of Surface Running Waters in Hawaii

### A. The Reasoning of *McBryde I*

The only private rights to surface running waters in the Hanapepe Valley specifically acknowledged to the parties by *McBryde I* are those referred to as appurtenant by that case and prior cases, i.e., rights to the amount of water used for taro cultivation on specific plots of ground at or immediately preceding the time of Land Commission Awards.[11] *McBryde Sugar Co. v. Robinson, supra* at 187-90, 504 P.2d at 1339-40; *see* Hutchins 102-03 and cases cited therein.[12] All other water in the valley (surplus water), *McBryde I* held, belongs to the State.

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[11] Under *McBryde I*, although in theory the acquisition of private rights to water by *prescription* is still possible in Hawaii, the holding that all surplus water in a stream or river belongs to the State renders the establishment of such rights as a practical matter highly problematical since, as the court held, "one may not claim title to or interest in state-owned property by adverse use." 54 Haw. at 198, 504 P.2d at 1345. Prescriptive rights to water would be possible only in the case of a watercourse in which the surplus water amounts in quantity to less than the water prescribed. Where any surplus exists, *McBryde I* requires that the appropriator "cease prescribing the State's portion." *Id.* at 198, 504 P.2d at 1345. Title to the prescribed water in excess of the surplus water, if any, *presumably* would continue to be tested under traditional principles relative to the establishment of title to private property by prescription or adverse use. *See* note 5 *supra.*

[12] *See also* H. A. Wadsworth, *A Historical Summary of Irrigation in Hawaii*, 37 The Hawaiian Planters' Record 124, 140 (1933) [hereinafter cited as Wadsworth].

The court's reasoning in this regard was based exclusively on language contained in the Land Commission Principles, RLH 1925, Vol. II, 2124, 2128 (originally enacted as L. 1847, at 81, 85).[13] The circumstances surrounding the adoption of the Land Commission Principles are detailed in *McBryde I.* 54 Haw. at 184-85, 504 P.2d at 1337-38. The only point needing reiteration here is that these measures were adopted by the Land Commission and approved by the Legislature for the purpose of providing the Land Commission with standards for the adjudication of private land titles following the Great Mahele of 1848, by which King Kamehameha III "proclaimed that he was sharing the lands in the Hawaiian Kingdom with his people." *McBryde Sugar Co. v. Robinson, supra* at 185, 504 P.2d at 1337-38.[14] It is true, as stated in *McBryde I,* that the Principles acknowledged the reservation by the sovereign of the "prerogative . . . to encourage and even to enforce the usufruct of lands for the common good." But to say that the king retained the power to "encourage" and "enforce" the "usufruct" of land is not to say that, *ipso facto,* he retained title to all surplus water in his kingdom. For while it is true that in ancient times "the King was the sole owner of the water as he was the rest of the land," *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.,* 15 Haw. 675, 680 (1904), the Land Commission was given the authority not only to confirm private allodial titles to land, but also to do so "in accordance with . . . native usages in regard to . . . *water privileges.*" RLH 1925, Vol. II, 2123 (originally enacted as An Act to Organize the Executive Departments of the Hawaiian Islands, L. 1846, Pt. I., ch. VII, art. IV) (emphasis added).

That one of the most important "usufructs" of land is the right to water cannot be doubted. *See McBryde*

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[13] The text of these Principles relied upon in *McBryde I* is set out at note 9 *supra.*

[14] *See generally* 1 R. KUYKENDALL, THE HAWAIIAN KINGDOM ch. XV (1938) [hereinafter cited as KUYKENDALL].

*Sugar Co. v. Robinson, supra* at 186 & n. 12, 504 P.2d at 1338 & n.12. However, to maintain, as the court did, that since water is a "usufruct" of land, therefore it was retained by the king after the Mahele, is a fruitless line of analysis. For if all "usufructs" of land were retained by the king, then nothing but bare legal title was passed by the Mahele and subsequent Land Commission Awards—a proposition which is patently incorrect if not absurd. A more useful approach to the question of who owns the surplus waters in Hawaii is to examine into Hawaiian usage and judicial precedent for enlightenment. The Land Commission Principles, at best, are ambiguous on the point and in and of themselves do not support the court's position.

### B. Ancient Hawaiian Usage

The ancient Hawaiian system of water rights was elaborate and well-defined, built largely around the dependence of the Hawaiian people on taro cultivation. See E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 57-67 (1972). Indeed, the Hawaiian word for law or regulation is *kanawai*, a compound of the word *wai*, meaning water[15]—a relationship which suggests that many early unwritten laws pertained to the regulation of water rights.[16] *See* A. PERRY, A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS 3 (1912).

Under ancient usage, the king owned all land and water in the kingdom. *See Territory v. Bishop Trust Co.*, 41 *Haw*. 358, 361 (1956). However, a grant by the king to a

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[15] M. PUKUI & S. ELBERT, HAWAIIAN-ENGLISH DICTIONARY 119 (3d ed. 1965), defines *kanawai* as: "Law, code, rule, statute; legal (perhaps so called because many early laws pertained to water [*wai*] rights)."

[16] For example, under ancient law, no dam could divert more than one-half of the water in a stream for irrigation. Moreover, the penalty for the malicious destruction of a lawful dam was death, the tamperer's body being used in repairing the damage to the dam by way of example. WADSWORTH 130. *See also* note 35 *infra*.

*konohiki* of an *ahupuaa* or an *ili kupono* carried with it not only the control of the land and the right to its products, but also the absolute right to control the disposition of surplus water. *See* HUTCHINS 84-85. Although the *konohiki* was always subject to summary disseizin by the king, the bundle of rights and powers concomitant with the grant of such a parcel of land clearly included the legal right to surplus water and the power to use it however the *konohiki* saw fit. *See* A. PERRY, *supra* at 11. Because such rights and powers were historically associated with land tenure in ancient Hawaii, it is natural to assume that when King Kamehameha III engineered the Great Mahele in 1848, he intended to *mahele* not only his legal title to the land but also his legal title to surplus water originating on all land not retained by himself as Crown property. As stated by Professor Wadsworth:

> Patently [surplus] water belonged to the chief, at the pleasure of the King, and in all logic the legal ownership passed to the chief along with the ownership of land upon his completion of the legal requirements of the Mahele.

WADSWORTH 132. *See generally* 1 KUYKENDALL ch. XV.

### C. Hawaiian Judicial Precedent

The foregoing general historical observations are supported by a long line of Hawaiian judicial precedent. I undertake to analyze this precedent here in order to point out more fully the errors of *McBryde I.*

*Peck v. Bailey*, 8 Haw. 658 (1867), was a controversy between landowners within an *ahupuaa* involving the right of one such landowner to make certain diversions of water from a river *originating* within the *ahupuaa* to dry (*kula*) land. Although the case specifically adjudicated only appurtenant water rights, the court observed, in dictum, that the conveyance by the king of land "bordering on [a] river will include the rights of water in said river, *which had* *not been before granted* [*i.e.*, surplus water]." *Id.* at 671 (emphasis added).

*Davis v. Afong*, 5 Haw. 216 (1884), involved a dispute over the right of a *konohiki* to appropriate running underground spring water which originated on his land. The court held that *konohiki* land awarded subsequent to the Mahele carried with it the right to the surplus spring water originating thereupon. However, the court's reasoning had more far-ranging implications. If private land grants pursuant to the Mahele included the right to running *spring* water (an important "usufruct" of the land), then it would seem that *a fortiori* the grants included the right to running surface water.[17]

In *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 15 Haw. 675 (1904), the court for the first time was faced squarely with the question of the ownership of surplus surface running water. The case involved a single *ahupuaa* that had been split in ownership between the complainant, as owner of the land in the *ahupuaa* in which a river originated, and the respondent, as owner of a large tract of *kula* land within the *ahupuaa*. At the heart of the suit were diversions by the respondent of all the surplus water from the river for the purpose of irrigating its *kula* land. The court held specifically that the grant to the respondent of the dry part of the *ahupuaa* did not carry with it the right to *all* the surplus water. *Id.* at 683. Instead, the court held:

> Surplus water. This, in our opinion, is the property of the konohiki [of the entire *ahupuaa*], to do with as

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[17] The court indicated as much in dictum:

> By the rules of ancient Hawaiian agriculture the konohiki patches would be entitled to water. And it is a general principle, and not disputed, that a landowner is entitled to the use of the water originating upon his land, subject only to the rights which others may acquire by prescription.

5 Haw. at 221.

> he pleases, and is not appurtenant to any particular portion of the ahupuaa. By ancient Hawaiian custom this was so . . . [N]o limitation, so far as we can learn, ever existed or was supposed to exist to his power to use the surplus water as he saw fit.

*Id. at* 680. The indication in *McBryde I* that the foregoing passage was dictum, 54 Haw. at 182, 504 P.2d at 1336, was erroneous, since the determination of who owned the surplus water was, as it is in this case, necessary to the proper resolution of the controversy between the parties to the suit. *Cf. State v. Tominaga,* 45 Haw. 604, 612-13, 372 P.2d 356, 361 (1962).

The next case to consider title to the surplus water of a stream was *Carter v. Territory,* 24 Haw. 47 (1917). In *Carter,* a stream originated on one *ahupuaa* (owned by the Territory) and flowed through that land to a second *ahupuaa* (owned by the plaintiff). The sole issue in the action was whether the Territory, *as* konohiki *of the upstream* ahupuaa, was entitled to all of the storm and freshet surplus water in the stream. The court acknowledged that "[w]here a stream flows through a single *ahupuaa* . . . the [normal] surplus waters of the stream belong to the *ahupuaa.*" *Id.* at 70. However, it went on to hold that the ownership of *storm and freshet water* which passes through two *ahupuaas* must be divided between them on the basis of the common law doctrine of riparianism.[18] *See Territory v. Gay,* 31 Haw. 376, 404 (1930) (Parsons, J., concurring in part and dissenting in part). Whatever the wisdom of the *Carter* court in adopting the riparian doctrine with respect to this class of surplus water, a necessary element of its holding in this regard was that such water was subject to private ownership and was *not* the property of the government. *See Foster v. Waiahole Water Co.,* 25 Haw. 726, 734 (1921) (surplus water is the "class of water which originally the chief or *konohiki* could dispose of at will irrespective of the rights of the other owners and tenants"). The overruling of this aspect of *Carter* in *McBryde I* was ill-advised, especially in light of the reliance on that case earlier in the court's opinion for the proposition that the water law of this State is governed by riparian doctrine. *See* 54 Haw. at 182, 504 P.2d at 1336.

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[18] See pt. III.D.2. *infra.*

Finally, *Territory v. Gay*, *supra*, held unequivocally that the normal surplus water of a stream was the private property of the *konohiki* of the *ahupuaa* or *ili kupono* on which it originates. This was a suit by the Territory to enjoin diversions by Gay and Robinson (both parties here) of surplus water from the Koula stream. The Territory argued that as owner of the *ahupuaa* of Hanapepe it was entitled to all the surplus water originating in the valley, even though the source of that water was in the *ilis kupono* of Koula and Manuahi, owned by Gay and Robinson. The court, however, reasoned that an *ili kupono* was co-equal in dignity with an *ahupuaa*, and that at least as to normal surplus water which originated on an *ili kupono* the *konohiki* thereof had title paramount to that of the *konohiki* of a downstream *ahupuaa*.[19] *McBryde I* gave a grudging acceptance to *Gay* by holding that as between the State and Gay and Robinson the case was res judicata. 54 Haw. at 177-79, 504 P.2d at 1334-35. However, the court proceeded to sap that precedent of its force by holding that under established Hawaiian water law there is no such thing as "normal daily surplus water." *Id.* at 199, 504 P.2d at 1345. In doing so, the court ignored the well-defined and often reiterated meaning acquired by the term "surplus water" over the course of more than a century of Hawaiian law, *viz.*, all water in a stream not required to satisfy appurtenant or prescriptive rights. *See* HUTCHINS 69 & n. 15 and cases cited therein; note 6 *supra*. It follows that the *Gay* case awarded to Gay and Robinson real and substantial water rights in accordance with this meaning. *See McBryde Sugar Co. v. Robinson, supra* at 206, 504 P.2d at 1348 (Marumoto, J., concurring and dissenting).

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[19] The *Gay* court was split three ways. Perry, C.J., felt that *all* the surplus water of a stream, normal and storm and freshet, belongs to the *konohiki*, and thus would have overruled Carter v. Territory, *supra*. Banks, J., would have held that all the surplus water of a stream belongs to owners of land along the *ripa* thereof according to the principles of common law riparianism, and therefore would have extended the *Carter* holding to include *both* storm and freshet surplus water and normal surplus water. Parsons, J., agreed with Mr. Chief Justice Perry that normal surplus water belongs to the *konohiki*, but concluded that on the record the question of title to storm and freshet surplus was not presented, and therefore expressed no opinion on the question of whether *Carter* should be overruled.

The foregoing judicial pronouncements, even standing alone, are highly persuasive authority for the proposition that title to the surplus waters of *maheled* land passed into the private hands of the *konohikis*. As stated in *Yoshizaki v. Hilo Hospital*, 50 Haw. 150, 153, 433 P.2d 220, 222-23 (1967), this court is not "as free in deciding cases in the area of real property as in the area of torts," even if it is assumed, for the sake of argument, that the above-mentioned line of precedent projects a consistently erroneous line of reasoning. *In re Austin*, 33 Haw. 832, 839 (1936) (the doctrine of stare decisis has a special force in the area of land law; even though prior decisions may be unsound, if they are "long established and conformed to . . . such decisions should not be overturned").[29] The very substantial agricultural industry of this state exists in its present configuration only by virtue of great expenditures made for the development of irrigation systems. *See McBryde Sugar Co. v. Robinson, supra* at 201, 208, 504 P.2d at 1346, 1349 (Marumoto, J., concurring and dissenting). These systems are designed to deliver vast amounts of water which, under prior decisions of this court, was thought to be the subject of private ownership and development. *See, e.g.*, WADSWORTH 150-58. *See generally* 3 KUYKENDALL 62-70; R. KUYKENDALL & A. DAY, HAWAII: A HISTORY 128, 153-54 (rev. ed. 1948).

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[29] *See* Langenegger v. State, 64 N.M. 218, 222, 326 P.2d 1098, 1101 (1958) ("The rule that these drainage waters are private has become a rule of property, and it is now too late to change it, even if we were inclined so to do").

I discuss the constitutional ramifications of the court's sudden about-face from these decisions in pt. IV of this opinion. But I need not rest the judgment that the court erred in *McBryde I* as a matter of state law solely on a re-evaluation of prior case law and ancient Hawaiian usage. There is other historical evidence which lends final force to that judgment.

### D. The 1917 Report of the Water Commission of the Territory of Hawaii to the Governor

In 1915, the Legislature of the Territory of Hawaii, concerned about providing for the optimum utilization of the water resources within the territory under then existing laws, passed An Act to Provide for the Appointment of a Commission to Examine into the Water Resources and Water Laws of the Territory. L. 1915, Act 36. The first section of the statute provided as follows:

> The governor is hereby authorized to appoint a commission of three persons, one or more of whom shall be a member or members of the legal profession, which shall serve without pay, *and which shall collect and examine available data and information relative to the water resources, both underground and surface, and both privately and publicly owned or controlled, in the Territory of Hawaii;*
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> *Which shall also examine and make a study of existing laws pertaining to the diverting, developing, using, conserving, holding, and wasting of water;*
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> Which shall, if deemed necessary, employ the services of legal and technical experts;
>
> Which shall have the power to visit, examine and measure all existing water sources, channels, ditches,

> wells, tunnels or other structures used for transporting or utilizing water; and
>
> *Which shall make such recommendations and draft such legislation as may by it be deemed necessary to serve the best interests of the people of the Territory of Hawaii,* and shall embody the same in a report to the governor on or before January 1, 1917.

(Emphasis added). As the italicized portions of the statute indicate, the mandate of the Commission was far-ranging, and included no less than an invitation to propose a complete revision of the water laws of the territory should such a change be found necessary.

Soon after the passage of the Act, the governor appointed Messrs. G. Larrison, A. Smith (then the first Deputy Attorney General of the Territory) and T. Sedgwick as commissioners to undertake the study. They were assisted in this regard by A. Chandler, a member of the State Water Commission of California and a foremost authority on water law. After nearly two years of preparation, the Commission issued its recommendations in the form of a *Report of the Water Commission of the Territory of Hawaii to His Excellency the Governor of Hawaii* (January 13, 1917) [hereinafter cited as *Water Commission Report*].

The Commission recommended the adoption of a detailed code relating to the development and husbandry of underground artesian water, because in large measure the use of such sources of water had begun relatively late in Hawaii's history, *see* 3 KUYKENDALL 66-70, and hence a tested and well-reasoned system of artesian water regulation had not had time to evolve. *See* HUTCHINS 178-79 and cases cited therein. The Legislature adopted virtually *verbatim* the specific legislation drafted by the Commission. RLH 1955 ch. 101 (originally enacted as L. 1917 ch. 156).

However, with respect to surface waters, the Commission reported as follows:

> *We have come to the conclusion that we do not care to recommend any legislation concerning surface waters.* As is stated by Mr. Chandler in his report to the Commission dated November 4, 1916 . . . *we already have a very good workable method for the determination of rights to surface waters; and the law relative thereto has been fairly definitely settled by a series of decisions.* There are, it is true, several questions as yet unsettled, but we believe them to be of such a nature that they can be better determined by the courts than by positive legislation which could only attempt to define and not change vested rights in the absence of provision for compensation therefor.
>
> *Accordingly, we make no recommendation for any legislation at the present time pertaining to the diverting, developing, using, conserving, holding or wasting of surface water.*

*Water Commission Report 9* (emphasis added). These recommendations were evidently accepted, for no laws relative to surface waters were subsequently forthcoming. This acceptance by the Legislature of the Commission's recommendation that existing judicial precedent adequately and correctly reflected the status of Hawaiian water law is legislative recognition that surplus surface waters belong to the *konohiki* of the *ahupuaa* or *ili kupono* on which they originate. The Commission and the Legislature not only had before them dicta supporting this proposition in *Peck v. Bailey, supra* and *Davis v. Afong, supra,* but also an express holding to this effect in *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., supra.*

## E. The Long-standing Position of the Territorial and State Governments of Hawaii with Respect to the Ownership of Surplus Water

### 1. *Evidence of the State's Non-ownership*

For a period in excess of 60 years, the government of Hawaii has executed the laws of the Territory and the

State in a manner which both expressly and impliedly has acknowledged that title to surplus water rests in the owner of *ahupuaa* or *ili kupono* on which it originates. Although in a position to know the law relating to this subject and to enforce it in the best interests of the people of Hawaii, successive attorneys general and their offices as well as territorial and state taxing authorities have consciously adopted legal positions premised on the basic proposition of private ownership of surplus water.

In a *Statement Regarding the Law of Waters and Water Rights in Hawaii, as Existing with Relation to Fresh Waters*, 4 HONOLULU WATER COMMISSION RECORDS 169 (1908), the then attorney general of the Territory of Hawaii, C. R. Hemenway, specifically acknowledged the right of the *konohiki* to surplus water arising on his land. In doing so, he noted that King Kamehameha III *maheled* not only land into private ownership, but also all the water flowing on the land. *Id.* at 169-70. Similarly, in 1919 the attorney general gave an opinion to the Lahainaluna School on Maui with respect to its water rights which rested on the implied proposition that the Pioneer Mill Company, not the Territory, owned the surplus waters flowing in the watercourses of the valley of Kauaha. 1919 OP. ATT'Y GEN. 386.

Other evidence of the government's position in this regard abounds. In *Carter v. Territory, supra,* the Territory took the unequivocal stance that surplus water belongs to the *konohiki* of the *ahupuaa* on which it originates. Opening Brief for Territory at 272-73. The legal arguments of the Territory in *Territory v. Gay, supra,* echoed its position in *Carter*. Opening Brief for Territory at 16. Indeed, in this very case the State made no claims to the surplus water of the Hanapepe watershed, conceding the private ownership thereof to Gay and Robinson. *Cf.* Opening Brief for State at 7-9, *McBryde Sugar Co. v. Robinson, supra.*

Moreover, since at least 1913, the Territory and thereafter the State have taxed surplus water severed in ownership from the land upon which it originated as the property of its private owner. *See In re Taxes, Waiahole Water Co.*, 21 Haw. 679 (1913). In *Waiahole Water,* this court upheld the taxation to the taxpayer of surplus water which had been conveyed to him by the *konohiki* of an *ahupuaa.* In holding that a tax assessment on the water separate from its land of origin was proper, the court noted that "[t]he intent of grantors, grantee *and assessor* to separate the water rights from the remaining interests in the lands is beyond doubt." *Id.* at 682 (emphasis added). *See also* Brief for appellee at 8-9, *id.* Similarly, it was established without contest in *Territory v. Gay, supra,* that "the Territory has been assessing and collecting taxes upon the land of Makaweli at its value as the same has been enhanced by the use of Koula water upon it, [*i.e.*,] the value of the [surplus] water has regularly been assessed for taxation as the private property of the respondents." Opening Brief for Gay and Robinson at 43, *id.*

This practice of taxing surplus water as private property, in addition to the knowingly and consistently followed position of successive attorneys general and their staffs, constitute compelling historical evidence that the State and its predecessor governments have at all times prior to this court's opinion in *McBryde I* regarded surplus water as private and not sovereign property. *In re Title of Kioloku,* 25 Haw. 357 (1920), is highly persuasive in this regard. In *Kioloku* the Territory claimed title to an *ahupuaa* that was ostensibly privately-owned on the ground that the land was not included in the Great Mahele of 1848. Although there was no record of an award of the land in question, the court nonetheless refused to award it to the Territory, reasoning that the government had made no claim of ownership of the property for nearly sixty years and that:

> during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the government down to the date of the institution of this proceeding. As said in *Jover v. Insular Government,* 221 U.S. 623

> [(1911)], we would not be justified in assuming that the State would collect taxes on its own property.

*Id.* at 364.[22]

The foregoing facts indicate persuasively that the reasoning of *McBryde I* turned on assumptions which are wholly unjustified by and contrary to the consistent and longstanding posture of the Hawaiian government with respect to surplus water. Such a posture knowingly adopted for more than half a century, is strong evidence of the government's non-ownership, and at the very least should have been dealt with by the majority.

### 2. *Equitable Estoppel*

In response to the argument of the Territory in *Territory v. Gay, supra,* that surplus water in the Hanapepe Valley was government owned, Gay and Robinson adduced considerable evidence that the government should be estopped from asserting whatever title it had to such water. *See* Gay and Robinson, *id.*, at 33-43. This evidence included the government's silence in the face of Gay and Robinson's overt and well-known expenditures of large sums of money for the development of surplus water, statements by then Governor Frear acquiescing in Gay and Robinson's claim of private title, and taxation by the Territory of surplus water as privately owned by Gay and Robinson.

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[22] In Jover v. Insular Government, 221 U.S. 623 (1911), the issue was whether an ancient land grant by the Spanish governor of the Philippine Islands to plaintiff's predecessor in interest was valid or in excess of the governor's authority. The Court held that in light of historical evidence the governor did have authority to execute the grant in question, but proceeded to consider the following other circumstances as supportive of this conclusion:

> The Spanish authorities at Manila, although familiar with what was done and claimed under the grant, and although in a position to know and enforce the law applicable to it, *did not call it in question at any time during the thirty-nine years of Spanish dominion after it was made, but, on the contrary, treated it as valid by imposing taxes upon the land as private property*. This is persuasive proof that in making the grant the Governor General did not exceed his authority.

*Id.* at 633 (emphasis added).

It was the position of Gay and Robinson that in the event it should lose on the issue of whether the *konohikis* of *ilis kupono* and *ahupuaas* were equal in status and rights, the evidence of the government's affirmations of and knowing acquiescence in Gay and Robinson's title to surplus water in the Hanapepe Valley, coupled with the latter's extensive reliance thereupon, sufficed equitably to estop the Territory from claiming ownership of the water. *Cf. Kauhi v. Liaikulani*, 3 Haw. 356 (1872). Of course, this position was never tested since *Territory v. Gay* held that Gay and Robinson owned the surplus water in any event. Nor did Gay and Robinson urge the point at trial in this case, since the basic ownership of surplus water in the valley was not contested by the State and since *Territory v. Gay* had *seemingly* settled the issue.

Whatever doubts that previously existed in this State as to whether the government can be equitably estopped, *see Godbold v. Manibog*, 36 Haw. 206, *reh. denied*, 36 Haw. 230 (1942), in my opinion were dispelled by *Yamada v. Natural Disaster Claims Commission*, 54 Haw. 621, 513 P.2d 1001 (1973). In an analysis that alternatively supported the result in the case, *Yamada* announced "that the doctrine of equitable estoppel is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice." *Id.* at 629, 513 P.2d at 1006. While this aspect of *Yamada* was subsequently disavowed by the court as not essential to the result in the case, *Yamada v. Natural Disaster Claims Commission*, 55 Haw. 126, 516 P.2d 336 (1973), the soundness of its reasoning has not been questioned. That it correctly projects the law of this jurisdiction is apparent from the recent decision of this court, *Waianae Model Neighborhood Association, Inc. v. City & County*, 55 Haw. 40, 44, 514 P.2d 861, 864 (1973), wherein we agreed with the following proposition as "eminently fair and equitable":

> [A]n act of an administrative official which is without any semblance of compliance with or authorization in an ordinance, is beyond his competence and is utterly void; but an act of such official, done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more than an irregularity, and *the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith.*

(Emphasis added).

*Yamada* involved an attempt by the Natural Disaster Claims Commission to revalue downwards certain tax credits it had awarded the plaintiff as a result of property losses he had suffered in a tsunami. Relying on the originally adjudicated amount of these credits, the plaintiff had made substantial expenditures in developing his property on the island of Hawaii. These expenditures in reasonable reliance on the Commission's award, the court held, meant that the government was estopped from now reducing that award. The court stated:

> A denial of such credits after more than two years means, in effect, that his investment in compliance with the statute is wholly dependent upon the State's continuing decision not to take away that which it gives. We think this is a patently unfair burden to impose upon the claimant.

54 Haw. at 630, 513 P.2d at 1007.

The relevance of *Yamada* to this controversy is obvious. That the government had led Gay and Robinson into the expenditure of large sums of money in the development of surplus water, Gay and Robinson offered to prove in *Territory v. Gay, supra.* Moreover, the position of the Territory in this regard originated at the highest levels of government, and was not merely the unauthorized stance of low-echelon employees. Compare *Godbold v. Manibog, supra* at 214-15. In the circumstances, even assuming the correctness of *McBryde I* as a general matter, Gay and Robinson should have been afforded an opportunity to prove that the State should be estopped from asserting ownership of the surplus water in the Hanapepe Valley. If anything, evidence showing the government's long-standing position and Gay and Robinson's reliance presents a factual situation in which the equities may be greater in favor of estoppel than in *Yamada*. Surely the logic of *Yamada* is that the government may not lawfully reverse previously firm policies with respect to property when, in reasonable reliance thereupon, private parties have expended significant sums of money. *See City of Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970). I find the majority's failure to consider this argument in the present case legally inexcusable.

### F. Normal Surplus Water is the Exclusive Property of the *Konohiki* of the *Ahupuaa* or *Ili Kupono* on which it Originates

In view of ancient Hawaiian usage, Hawaiian judicial precedent, and the other historical evidence explored in this opinion, I would reverse *McBryde I* with respect to the ownership of normal surplus water and adhere to the prior position of this court consistently expressed in *Hawaiian Commercial Sugar Co. v. Wailuku Sugar Co., supra, Carter v. Territory, supra*, and *Territory v. Gay, supra*. To reiterate, these cases held that when Kamehameha III *maheled* his lands in 1848, it was his clear intent to pass both the title to land and the title to water thereupon. Consistent with ancient Hawaiian usage, this meant that the *konohikis* devolved title to all surface water originating on their lands excepting that required to satisfy the appurtenant rights and prescriptive rights of others. Stated flatly, normal surplus water should be the private property of the *konohiki* from whose land it springs and not the property of the State.

## III. The Transferability of Privately Owned Water in Hawaii

### A. The Reasoning of *McBryde I*

The second major branch of *McBryde I* was that private water rights, however acquired,[22] are subject to the strictures of the common law doctrine of riparianism. Under that doctrine, the ownership of a parcel of land abutting the *ripa* of a stream carries with it "the right to flow of [the] stream in the form and size given it by nature." *McBryde Sugar Co. v. Robinson, supra* at 192-93, 504 P.2d at 1342. The court held that a corollary of this right at common law is the privilege of riparian landowners to prohibit the diversion of water by one such landowner unless he returns it to its original watercourse substantially undiminished in quantity. *See* HUTCHINS 95; L. TECLAFF, *What You Have Always Wanted to Know about Riparian Rights, But were Afraid to Ask*, 12 NATURAL RESOURCES J. 30, 39-53 (1972) [hereinafter cited as TECLAFF].

The court's reasoning was bottomed wholly on section 7 of the Enactment of Further Principles, originally published as L. 1850, § 7, at 202, and presently compiled in HRS § 7-1[23] which, in its English version, guarantees to the "people . . . a right to drinking water [and] running water," and also declares that "[t]he springs of water [and] running water shall be free to all, on all lands granted in fee simple." Based on this language, and the historical generalization that "the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts," 54 Haw. at 193, 504 P.2d at 1342, the court concluded that privately owned water may only be used in connection with the land to which it is appurtenant and may not be transported to *kula* land elsewhere. This conclusion followed, it was thought, from the cases and authorities on common law riparianism which were examined with considerable care in *McBryde I. Id.* at 193-97, 504 P.2d at 1342-44.

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[22] In view of the holding of *McBryde I* such private rights would include water appurtenant to a specific parcel of land and water acquired by prescription, but not normal and storm and freshet surplus waters.

[23] This section is set out in full at note 10 *supra*.

While *McBryde I* may have been adequate in its exegesis of the law of riparianism as a general matter, it is my opinion that the court erred in holding that the Enactment of Further Principles codified that law as the system by which to measure water rights in Hawaii. While the array of authorities affirming my position in this respect are persuasive as a matter of water *policy*,[34] I base my conclusions primarily on statutory construction and an analysis of Hawaiian usage and judicial precedent during the Hawaiian monarchy and thereafter.

Under HRS § 1-1,[35] it would be the responsibility of the court to declare riparianism to be the law of this State

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[34] As stated by Mr. Hutchins:

> [T]he riparian doctrine . . . is not well suited to areas in Hawaii . . . in which the demand for irrigation water substantially exceeds the supply. . . .
>
> The . . . doctrine was developed under essentially humid conditions, where the supplies of water generally were much greater than the requirements for water, and where irrigation seldom was practiced, if at all.

HUTCHINS at 95; *see* C. HEMENWAY, *Statement Regarding the Law of Waters and Water Rights in Hawaii, as Existing with Relation to Fresh Waters*, 4 HONOLULU WATER COMMISSION RECORDS 169, 171 (1908); WADSWORTH *passim*; *cf.* City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912, 938-43 (1929) (declining to adopt as the law of Hawaii the English common law rule of absolute ownership of percolating waters). *See generally* TECLAFF 39-53.

[35] That section provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly

*unless* it was able to discern "Hawaiian judicial precedent . . . or . . . Hawaiian usage" indicating that a different legal doctrine had been followed in Hawaii prior to January 1, 1893.[38] As will be demonstrated, however, Hawaiian history and case law establish that privately owned water is severable from the land to which is was originally appurtenant and is freely transportable to other lands both within and without the same watershed—a doctrine fundamentally at odds with the riparian theory espoused by *McBryde I.*

### B. Section 7 of the Enactment of Further Principles

Subsequent to the Great Mahele, all lands in Hawaii were divided into three main categories: Crown Lands (retained by the King for his own private estate), *Konohiki* Lands *(maheled* into the private ownership of the chiefs and *konohikis),* and the Government Lands (established as the property of the King *as sovereign* of Hawaii). *See* I KUYKENDALL 288-89. All of these lands, however, were

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provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

[38] The Hawaiian judicial precedent and usage referred to in HRS § 1-1 are those that arose prior to January 1, 1893, the effective date of that section. State v. Zimring, 52 Haw. 472, 474-75, 479 P.2d 202, 204 (1970); De Freitas v. Coke, 46 Haw. 425, 429-30, 380 P.2d 762, 765-66 (1963). The basic purpose of the provision was summarized in *De Freitas* as follows:

> It is apparent that when the legislature adopted [HRS § 1-1] it was cognizant of the fact that before such enactment, the courts of Hawaii had not adopted the common law of England *in toto* and consequently made certain qualifications. Accordingly, it was deemed necessary to provide for exceptions.

*Id.* at 430, 380 P.2d at 766.

made "subject to the rights of tenants" *(hoaainas)* by virtue of An Act Relating to the Lands of His Majesty the King and of the Government, RLH 1925, Vol. II, 2152 (originally enacted as L. 1848, at 22).

Events made it clear, however, that the phrase "rights of tenants" was not self-explanatory, and that legislation was needed to define *hoaaina* rights with greater particularity. Accordingly, the Privy Council undertook to delineate the specific meaning that the Great Mahele had for the *hoaainas* living on the three principal categories of *maheled* land. *See generally* J. Chinen, The Great Mahele: Hawaii's Land Division of 1848, at 29-31 (1958). As a result of their deliberations, on December 21, 1849 the Privy Council adopted four resolutions which were enacted by the Legislature as the first four sections of the Enactment of Further Principles on August 6, 1850. These four sections, together with sections 5 and 6 passed by the Legislature on August 15, 1850, afforded *hoaainas* the private ownership of those parcels of land which they had traditionally dwelled upon and cultivated, and also established procedures by which *hoaainas* could receive allodial title to their *kuleanas* by way of grants from the Land Commission.

It was not until nearly one year later, however, that the Legislature added section 7 to these provisions. The legislative history of this section shows that it was intended to be the sole and exclusive measure of the rights of the *hoaainas* as against the *konohikis* of the land within which the *kuleanas* were situated. *See Oni v. Meek,* 2 Haw. 87, 94-96 (1858) (Robertson, J.).[27] *See also Carter v. Territory,*

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[27] In *Oni,* a *hoaaina* claimed the right of pasturage against his *konohiki* based upon, *inter alia,* ancient tenant usage in the area. The court held, however, that section 7 of the Enactment of Further Principles was a declaration of "*all* the specific rights of the hoaaina, (excepting fishing rights) which should be held to prevail against the fee simple title of the konohiki," 2 Haw. at 95, and that the failure of that section to provide specifically for the right of pasturage meant that no such right existed.

24 Haw. 47, 67 (1917). Subsequent to the adoption by the Privy Council of the first six sections of the Enactment of Further Principles, but prior to their passage by the Legislature, the King had expressed concern that "a little bit of land, even with allodial title, if they [the *hoaainas*] were cut off from all other privileges, would be of very little value." *Privy Council Minutes* (July 13, 1850).

This concern matured into the enumeration of specific *hoaaina* rights contained in section 7, adopted by the Privy Council on August 27, 1850. The measure was the product of deliberations among "the *native* members of the Privy Council presided over by the King," *Privy Council Minutes* (August 17, 1850) (emphasis added), an historical circumstance which severely undercuts the assumption in *McBryde I* that section 7 was the product of *haole* missionaries with backgrounds in English common law. Section 7 was finally enacted by the Legislature in June of 1851, and signed into law by the King on July 11, 1851. L. 1851, at 98-99. It was passed and printed in both the Hawaiian and English languages.

As indicated previously, the English version of the statute provided that "[t]he people shall also have a right to *drinking water*, and *running water*, and the right of way, [and t]he . . . *running water*, and roads shall be free to all, on all lands granted in fee simple." (Emphasis added). The word "people" in this section was properly interpreted by Mr. Justice Robertson in *Oni v. Meek*, *supra* at 96, to mean the *hoaainas* within the boundaries of the *konohiki's* land. *McBryde I* held that the right of these *hoaainas* to "drinking water" and "running water" in the English version of the statute meant the right to the natural flow of a stream in accordance with riparian doctrine—a right which passed to successors in interest to their *kuleana* lands.

However, the Hawaiian version of the statute does not bear out the court's interpretation. The original Hawaiian text is as follows:

> I ka alodio ana o kekahi Konohiki i kona aina, a mau aina paha, aole no e nele na kanaka o kona aina ponoi a mau aina paha i ke kii ana i wahie, a i laau hale, a i aho, a i kaula a i pili, a i lai nona iho, aole nae i mea kuai i mea e waiwai ai oia, e loaa no hoi ia lakou ka pono o ka wai inu, a me ka *wai hookahe*, a me ke ala hele. A o na punawai a me na *wai e kahe ana*, a me na ala hele e noa no ia i na kanaka a pau mai o a o, ma na aina Alodio. Aole nae pili keia i na punawai, a me na hawai i hanaia e pono ai lakou iho.

(Emphasis added).

I have independently investigated the meaning of the Hawaiian, with particular focus on the phrases "*wai hookahe*" and "*wai e kahe ana*," which were translated in the English to mean "running water."[28] While it is true that "[w]henever there is found to exist any *radical or irreconcilable* difference between the English and Hawaiian version of any of the laws of the State, the English version shall be held binding," HRS § 1-13 (emphasis added),[29] the difference between the two versions in this case is not "radical or irreconcilable," and hence the Hawaiian can be used as an aid in the interpretation of

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[28] This court has stated on numerous occasions that judges in Hawaii are "at liberty to resort, if necessary or convenient, to such trustworthy sources of information as may be deemed expedient" in resolving questions of the interpretation of an instrument or statute written in Hawaiian. Hapai v. Brown, 21 Haw. 499, 503 (1913). Such sources may include both dictionaries *and* experts (both of which were used here). *Id.* at 502-03; *see* Territory v. Bishop Trust Co., 41 Haw. 358, 367 (1956); Ii v. Judd, 13 Haw. 319, 325 (1901).

[29] HRS § 1-13 is an expanded version of section 1493 of The Civil Code of the Hawaiian Islands ch. 41, at 367 (1859), which provided:

> SECTION 1493. If at any time a radical and irreconcilable difference, shall be found to exist between the English and Hawaiian versions of any part of this Code, the English version shall be held binding.

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The reason for the limitation of this section to "radical and irreconcilable" differences can be discerned from the Preface to the Civil Code of 1859:

> In accordance with a Joint Resolution of the Leigslature, the undersigned were appointed by the Minister of the Interior to compare the Hawaiian and English versions of the New Code, assimilating the same as far as practicable, and to superintend the publication of the same. *The work of comparing and assimilating the two versions, has been one of great labor and care; and while we cannot hope to have effected a perfect agreement between the Hawaiian and English texts, we feel confident that, in this respect, the Civil Code will be found more satisfactory than any of the laws published heretofore.*
>
> R. ARMSTRONG,
>
> G. M. ROBERTSON,
>
> Committee on Publication.

(Emphasis added). The confessed inability of the translators to achieve a perfect coincidence between the two languages underscores the need for comparative analysis of a bilingual statute where a conflict therein appears to be less than "radical and irreconcilable." This was just as true after the Civil Code as before it, when the Hawaiian version of a statute was held judicially to control in cases of radical or irreconcilable conflict. *Compare* Metcalf v. Kahai, 1 Haw. *225 (1856) (conflict is irreconcilable and hence the Hawaiian version controls when the English text holds owners of estray animals liable for four times the actual damage done and the Hawaiian text hold such owners liable only for actual damages) *with* Hardy v. Ruggles, 1 Haw. *225, 259 (1856) ("where there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country . . . [but *t*]*he English and Hawaiian may often be used to help and explain each other where the meaning is obscure, or the contradiction slight*") (emphasis added).

the English.[30] This analysis is particularly appropriate with respect to section 7, in view of the fact noted above that the *native* members of the Privy Council, presided over by the King, initially drafted that provision and hence would logically be expected to have expressed themselves first in their native tongue.

I have consulted three dictionaries of the Hawaiian language [31] and Mrs. Zelie D. Sherwood, an expert translator of Hawaiian,[32] and all four sources independently confirm that, properly translated, the phrase "*wai hookahe*" means "water made to flow or to irrigate," and the phrase "*wai e kahe ana*" means "water already flowing." [33] Mrs. Sherwood has provided her translation of the whole text of section 7, and it would be instructive to quote the translation in full. It reads:

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[30] *See* cases cited in note 29 *supra*. As stated in In re Ross, 8 Haw. 478, 480 (1892) (emphasis added):

> [T]he two versions [English and Hawaiian] constitute but one act. There is no dual legislation. As a rule one version is the translation of the other. *The effort is always made to have them exactly coincide,* and the legal presumption is that they do.

[31] L. ANDREWS & H. PARKER, A DICTIONARY OF THE HAWAIIAN LANGUAGE (1922) (prepared under the direction of the Board of Commissioners of Public Archives of the Territory of Hawaii); M. JUDD, M. PUKUI & J. STOKES, INTRODUCTION TO THE HAWAIIAN LANGUAGE (1945); M. PUKUI & S. ELBERT, HAWAIIAN-ENGLISH DICTIONARY (3d ed. 1965).

[32] Mrs. Sherwood has testified as an expert frequently in civil litigation involving the translation of instruments written in Hawaiian, has translated Hawaiian documents for abstracting companies for more than 40 years, and is the author of ZELIE D. (FERNANDEZ) SHERWOOD, BEGINNING HAWAIIAN vols. I & II (1955).

[33] A reading of the English version of the proviso to section 7 supports this interpretation. The proviso announces that "water courses, which individuals have made for their own use" shall *not* be considered "running water" which is "free to all" within the meaning of the first part of the sentence of which the proviso is a part. The clear implication is that *ancient* water courses (*auwais*) are to be considered "running water" and that the intent declar-

> When a konohiki acquires Allodial Title to his land or lands, the native tenants on his own land or lands shall not be deprived of gathering fire wood, and wood for homes, twine, rope, pili and ti leaf for his own use, not, however for personal gain, they shall also have the right to drinking water, *to bring about the flowage of water* and a pathway. The wells and water *already flowing* and the pathways shall be free to all native tenants from one end of the Allodial lands to the other. This, however, does not include wells and aqueducts made for their own personal gain.

(Emphasis added).

In my opinion, the foregoing translation accurately reflects the original meaning of section 7, which was merely that *kuleana* plots were guaranteed the right to appurtenant water for domestic and irrigation purposes, and in that context, the English translation reserving to *hoaainas* the right to "running water" is inherently ambiguous. "Running water" can mean many things, including water used for irrigation and domestic purposes, and therefore the more precise Hawaiian terms "*wai hookahe*" and "*wai e kahe ana*" (both denoting such limited uses of water) should be read by this court to qualify and limit the English. Compare *Metcalf v. Kahai,* 1 Haw. *225 (1856). This is an instance in which the English and Hawaiian texts are not in "radical or irreconcilable" conflict within the meaning of HRS § 1-13, but rather is an instance in which "the meaning is obscure, or the contradiction slight," and hence in which the two languages "may . . . be used to help and explain each other." *Hardy v. Ruggles,* 1 Haw. *255, 259 (1856) *see* notes 29 & 30 *supra.*

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ing these *auwais* as "free to all" was merely to allow *hoaainas* to satisfy their domestic and agricultural water needs. *Cf.* Carter v. Territory, 24 Haw. 47, 58-59, 67 (1917).

The foregoing analysis manifests the error of *McBryde I*. Section 7 of the Enactment of Further Principles guaranteed the right of *hoaainas* to water *for irrigation* and other domestic purposes. The obviously limited scope of this provision belies the court's interpretation of it as a wholesale codification of the common law doctrine of riparianism. Indeed, the right to use water for irrigation is wholly antithetical to riparianism as it existed in mid-nineteenth century England and Massachusetts. *See* HUTCHINS at 95: TECLAFF 44-45.

It follows that the reliance on this statute in *McBryde I* was misplaced. Analysis must therefore turn to whether Hawaiian judicial precedent or usage prior to January 1, 1893 established a system of water regulation different from the riparian doctrine that would otherwise be the law of this State by virtue of HRS § 1-1.[34]

### C. Hawaiian Usage Prior to January 1, 1983

#### 1. *Ancient Hawaiian Usage*

As indicated previously in this opinion, *see* pt. II.B. *supra*, central to Hawaiian culture prior to the advent of western influence was a sophisticated system of water regulation. Early Caucasian explorers, including Cook in 1778, Vancouver in 1798, and Campbell in 1809 commented with amazement and admiration on the complicated and technically advanced network of canals utilized by the Hawaiians in irrigating their crops. *See* WADSWORTH 125. Modern historians of Hawaiian civilization confirm the existence of these irrigation systems. *See, e.g.*, E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 62-63 (1972); R. KUYKENDALL & A. DAY, HAWAII: A HISTORY 9, 91 (1948); A. PERRY, A BRIEF HISTORY OF HAWAIIAN WATER RIGHTS 3-7 (1912); WADSWORTH 125-36.

It has been noted already that under the ancient system of land tenure, the *konohiki* of an *ahupuaa* or *ili kupono* was given control over the surplus water originating on the land, albeit subject to the king's ultimate power of disseizin. The *konohiki* had plenary authority to demand the production of labor for the construction and maintenance of *auwais*, and also to marshal the water resources of the *ahupuaa* or *ili kupono* according to his perception of the relative agricultural and domestic needs of the *hoaainas* living thereupon. WADSWORTH 129-31. Traditionally, it was always within the power of the *konohiki* to divert water from lands on the *ripa* of a stream to other lands which were not appurtenant to the stream and which, indeed, had always theretofore been *kula*. See *Territory v. Gay*, 31 Haw. 376, 399-400 (1930); HUTCHINS 84-85.

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[34] See notes 25 & 26 *supra*.

While it is true that these diversions from wet taro lands to *kula* lands for the most part occurred within the confines of a single watershed, this was probably only due to the absence of the technology required for the transportation of water across mountain ridges.[35] *See Wong Leong v. Irwin*, 10 Haw. 265, 271-72 (1896). As stated in *Irwin*, however, "[t]here is no difference in principle between a transfer [of water] from one place to another in the same ahupuaa and a transfer from one ahupuaa to another [outside the watershed of the first ahupuaa.]'' *Id.* at 272. By hypothesis, both kinds of transfers assume water to be both the private property of the transferor and capable of permanent diversion from its original watercourse—characteristics which are inherently inimicable to the theory of riparianism which was expounded in *McBryde I. See McBryde Sugar Co. v. Robinson, supra* at 193-97, 504 P.2d at 1342-44.[36]

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[35] The Hawaiians in fact made inter-watershed transfers of water where technologically possible and economically necessary. There is, for example, an ancient aqueduct on Kauai, called the Menehune Ditch, which "is built around the base of a high cliff which hems in the Waimea River just before it reaches its delta area on the southwest coast of the island, and diverts irrigation water from the river to the series of *lo'i* [irrigated taro terraces] to seaward of the cliff." E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 62 (1972). Furthermore, there is some evidence that with the use of gunpowder supplied by Caucasians in the early nineteenth century the Hawaiians constructed aqueducts for the transportation of water from one watershed to another. There exists, for example, an irrigation tunnel between watersheds near Niulii on the Island of Hawaii which had to be driven through 200 feet of lava rock. Its date of construction is put at between 1823-49 by one commentator, J. WILLIAMS, *A Little Known Engineering Work in Hawaii*, 1919 THRUM'S ANNUAL 121-26, and at an even earlier date by another commentator, WADSWORTH 127.

### 2. *Hawaiian Usage in the Latter Half of the Nineteenth Century*

With the advent of large-scale sugar cane cultivation in the last half of the nineteenth century, irrigation and water rights acquired a new dimension of importance in Hawaii.[37] The estimated requirement of a ton of water to produce one pound of refined sugar, 3 KUYKENDALL 62, made the securing of ample supplies of water essential for sugar producers. The first irrigation *auwai* built expressly for sugar cane was in 1856 on Kauai, and another was dug ten years later on Maui. *See* R. KUYKENDALL & A. DAY, HAWAII: A HISTORY 119-20 (1948). While early producers made use of ancient *auwais*, the phenomenal growth in the number of acres of land under sugar cane cultivation during the period of 1874-98,[38] especially when much of that land was in relatively arid locales theretofore uncultivated, resulted in the construction of costly and elaborate new irrigation systems. The first such system of any size was the Hamakua ditch on the island of Maui, built in 1878 for the purpose of irrigating sugar cane on the arid lands of central Maui with water from the northern side of the island. 3 KUYKENDALL 62-66; WADSWORTH 144. A great many other aqueducts were built thereafter, at considerable cost and for the purpose of irrigating *kula* land both inside and outside the watersheds from which the water was drawn. *See generally id.* at 150-58. Indeed, by 1890-91, an irrigation system for the transportation of water from the Hanapepe Valley to Makaweli on the Island of Kauai was completed and in operation. *See Territory v. Gay*, 52 F.2d 356 (9th Cir. 1931); 3 KUYKENDALL 66.

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[36] *McBryde I* also indicates that the riparian rights of the *hoaaina* "may be in connection with his right of laundering, canoeing, swimming, bathing, etc." 54 Haw. at 193, 504 P.2d at 1342. In this connection it should be noted that under ancient Hawaiian unwritten law it was *kapu* for an individual to swim or bathe in a stream at any point above its mouth, *see* J. Wise, *The History of Land Ownership in Hawaii* 86, in ANCIENT HAWAIIAN CIVILIZATION: A SERIES OF LECTURES DELIVERED AT THE KAMEHAMEHA SCHOOLS 81 (rev. ed. 1973)—an "Hawaiian usage" within the meaning of HRS § 1-1 which, if true, would lessen the enjoyment, if nothing else, of the riparian rights purportedly announced in *McBryde I*.

[37] It is interesting to note that the development of irrigation on a large scale in the continental United States is generally said to have begun with the Mormon migration to Utah in 1847. The growth of sugar cane irrigation in Hawaii was "essentially concurrent" with this development. WADSWORTH 142.

It seems clear that the foregoing history of ancient and nineteenth century Hawaiian water practices, sanctioned by contemporaneous judicial precedent, *see* pt. III.D. 1. *infra*, establishes an "Hawaiian usage" fundamentally at odds with the common law doctrine of riparianism. This being the case, HRS § 1-1 does not compel the court to read that doctrine in *toto* into our legal system dealing with regulation of water rights.

### D. Hawaiian Judicial Precedent on the Subject of Water Transferability

#### 1. *Peck v. Bailey, 8 Haw. 658 (1867)*

The *Peck* decision was the product of Hawaii Supreme Court Chief Justice Allen sitting as a single justice in an equity proceeding in Superior Court. As indicated previously in this opinion, the case involved a controversy between landowners within a single *ahupuaa* with respect to one landowner's right to divert water which was appurtenant to a particular parcel of land from that land to another, *kula* parcel. Although the opinion discussed common law riparianism, the Chief Justice impliedly rejected that doctrine when he held as follows:

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[38] Dr. Kuykendall notes that during the period of 1874-98, the number of acres under sugar cane cultivation increased from 12,225 to 125,000—a ten-fold expansion. 3 KUYKENDALL 62.

> The Court is of opinion, however, that the defendant had the right to use the water of his kalo [taro] land on other lands, if in the transfer or passage of water over his own land no injury was done to others. He is limited to the same quantity of water to which he was entitled on his kalo land by immemorial usage.

*Id.* at 666. The indication in *McBryde* I that this passage was dictum, 54 Haw. at 181, 504 P.2d at 1336, was unjustified, since essential to the resolution of the controversy in *Peck* was a decision on the question of water transferability. *Cf. State v. Tominaga,* 45 Haw. 604, 612-13, 372 P.2d 356, 361 (1962).

*Peck* was the only decision prior to January 1, 1893 which squarely dealt with the question of water transferability. *Cf. Kahookiekie v. Keanini,* 8 Haw. 310 (1891). Notwithstanding its status as a single justice opinion, *Peck* stands as "judicial precedent" within the meaning of HRS § 1-1, establishing the proposition that privately owned water is freely transferable to *kula* land and therefore that riparianism is not the law of this State. All subsequent opinions have so interpreted the case, and in view of the Hawaiian usage contemporary with *Peck* and in ancient times, the court should give effect to its holding.

### 2. *Cases decided after January 1, 1893*

A brief review of the cases decided by this court on the subject of water transferability since *Peck* will highlight the incorrectness of *McBryde I.*

*Lonoaea v. Wailuku Sugar Co.,* 9 Haw. 651 (1895) involved the question of the transferability of water from a river to *kula* land within the same watershed. The court held:

> We find no objection either in law or reason to allowing the owner of land which is entitled to water from transferring the same amount of water to other land providing he thereby works no injury to others.

*Id.* at 665. This holding was reiterated on similar facts in *Horner v. Kumuliili,* 10 Haw. 174 (1895).

In *Wong Leong v. Irwin,* 10 Haw. 265 (1896), the defendant had diverted water from one watershed to *kula* land in another watershed. The court held specifically that the owner of land with the appurtenant or prescriptive right to water could transfer that water to *any* other land, whether in the same watershed or in another watershed, so long as the water rights of others were not thereby compromised. *Id.* at 270-72. The same reasoning was followed in *Palolo Land & Improvement Co. v. Wong Quai,* 15 Haw. 554 (1903). although that case involved the transfer of water to land in a single watershed.

The next case in sequence of time was *Carter v. Territory,* 24 Haw. 47 (1917). *Carter* dealt with a controversy between *konohikis* of two *ahupuaas* over storm and freshet surplus water which on occasion ran in a stream passing through both *ahupuaas*. The court held that the *konohikis* must share these storm and freshet waters according to the principles of common law riparianism. Although the reasoning of the *Carter* court is highly unsatisfactory in this regard, the result is nonetheless defensible on the ground that in ancient times the Hawaiians rarely availed themselves of storm precipitation and that therefore no "Hawaiian usage" under HRS § 1-1 existed to supplant common law riparianism as to this class of water. *McBryde Sugar Co. v. Robinson, supra* at 205-06, 504 P.2d at 1348 (Marumoto, J., concurring and dissenting); *see* HUTCHINS 94. Regardless of the wisdom of *Carter* in terms of overall water policy, *see id.* at 94-98, its impact is "probably not of great practical importance in Hawaii, where the characteristic drainage areas are short and steep, where the flood waters of many streams come down in great quantities and flow for brief periods, and where practicable means of storing large quantities of flood water are not available." *Id.* at 95. Moreover, the holding of *Carter* has acquired over the course of more than half a century a special force as a rule of property law which is "long established and conformed to" and which therefore "should not be overturned" by this court. *In re Austin*, 33 Haw. 832, 839 (1936); *see* note 20 *supra*. The decision in *McBryde I* to overrule this aspect of *Carter* does violence to this basic principle of stare decisis.

The limited scope of the riparian doctrine announced in *Carter* was soon accentuated in *Foster v. Waiahole Water Co.*, 25 Haw. 726, 733-35 (1921), which held that *normal* surplus water was never appurtenant to any particular parcel of an *ahupuaa* or *ili kupono* and that it was freely conveyable by the *konohiki* apart from its land of origin. *Cf. In re Taxes Waiahole Water Co.*, 21 Haw. 679 (1913).

Finally, *Territory v. Gay*, 31 Haw. 376 (1930) applied *Wong Leong v. Irwin*, *supra*, to normal surplus water and held that the *konohiki* of the *ahupuaa* or *ili kupono* on which such water arose could transport it wherever he wished, including to *kula* land in an entirely different watershed. In doing so, a divided court expressly rejected riparianism as applied to any other class of water than the storm and freshet surplus dealt with in *Carter*. *See* note 19 *supra*. As Mr. Chief Justice Perry indicated:

> While it is, perhaps, technically true that, as stated in the *Carter* case, "private water rights in Hawaii are governed by the principles of the common law of England except so far as they have been modified by or are inconsistent with Hawaiian statutes, custom or judicial precedent," that statement is of very little, if any, consequence or significance in view of the widely prevailing Hawaiian customs and the judicial prece-

> dents long since established with reference to water rights in this Territory. Our system of water rights is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water. No modifications of that system have been engrafted upon it by the application of any principles of the common law of England.

31 Haw. at 394-95. In my opinion, the foregoing statement correctly articulates the relationship between Hawaiian water law and common law riparianism except in the limited circumstances of the *Carter* case, and therefore the court should adhere to it in lieu of the analysis of the subject contained in *McBryde I*.

### IV. The Unconstitutionality of McBryde I

While the constitutionality of *McBryde I* was not one of the issues to which the court directed the parties to file briefs on rehearing, it is my opinion that the court should have dealt with this aspect of the case. In view of the wholly unexpected nature of the court's holdings in *McBryde I*, the parties of course could not have been expected to raise their constitutional claims as part of their appeals from the decision of the trial court. Since the parties asserted constitutional grounds for the reversal of *McBryde I* at the first possible instance—in their petitions for rehearing—their arguments in this respect are properly before the court, *cf. Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930), and therefore I consider myself bound to discuss them here.

The due process clause of the fourteenth amendment to the Federal Constitution and article I, sections 4 and 18 of the State Constitution forbid the State from taking private property without just compensation. This prohibition speaks to all instrumentalities of state government equally, restraining the courts from engineering unconstitutional takings no less than the legislature. *See Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241

(1897). *See generally Shelley v. Kraemer,* 334 U.S. 1, 14-15 (1948), and cases cited therein.

Although as a general rule judges are free to overrule prior cases which changed circumstances and perceptions reveal to have been unwisely decided, there are constitutional limits on their power to do so. *Compare Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra* at 681 n.8 (Brandeis, J.) *with Hughes v. State of Washington,* 389 U.S. 290, 294 (1967) (Stewart, J., concurring). *See generally Southern Pacific Co. v. Jensen,* 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). In particular, when prior judicial precedent has established unequivocally a certain property right, a court may not subsequently declare that the right never existed when the consequence of such a holding is to frustrate the expectations of parties who justifiably relied on prior law in the management of their affairs. *See, e.g., Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *Muhlker v. New York & Harlem R.R.,* 197 U.S. 544 (1905); *cf. N.A.A.C.P. v. Alabama,* 357 U.S. 449, 454-58 (1958).

Water rights associated with the ownership of land have always been regarded as property in Hawaiian jurisprudence. *See Peck v. Bailey,* 8 Haw. 658, 661-62 (1867); *Kaneohe Ranch Co. v. Ah On,* 11 Haw. 275 (1898). Specifically, the cases discussed previously in this opinion have held uniformly and without ambiguity that the successor in interest to the *konohiki* of an *ahupuaa* takes full title to all surplus water arising on his land, see pt. II.C. *supra* and that the same right devolves upon the successor in interest to the *konohiki* of an *ili kupono. Territory v. Gay, supra.* Likewise, prior case law in this jurisdiction has established with clarity that privately owned water is freely transferable to lands other than those to which it is appurtenant. *See* pt. III.D.2. *supra.* Gay and Robinson has expended large sums of money in the development and transportation of the surplus water which prior decisions of this court indicated that it owned, and the other private parties to this action have purchased their land, invested in irrigation systems, and entered into contractual relationships with buyers of water, all in reliance on the principle of free transferability of water rights espoused by a long line of Hawaii cases. In the circumstances, the decision of *McBryde I* that surplus water is owned by the State and that private water rights are appurtenant exclusively to the parcels of land on which they originate must be viewed as a retroactive "taking" of property theretofore recognized as privately owned.

A case in point is *Muhlker v. New York & Harlem R.R., supra*. In 1888, Muhlker bought a plot adjacent to a strip of land used for surface-level railroad tracks. In 1891, he erected a five story building on his parcel, at a time when the existing case law of New York held that a property owner's easements of light and air could not be acquired through prescription by a railroad company whose tracks were on the ground level of an adjacent piece of land. Muhlker sued to enjoin the railroad from erecting an elevated railroad which would have interfered with these easements, and an injunction was issued by the trial court and affirmed by the Appellate Division of the Supreme Court on the basis of the prior New York cases directly in point. The New York Court of Appeals, however, reversed in an opinion which in function overruled the prior cases and held that Muhlker's easements of light and air could be eliminated without compensation. This decision was in turn reversed by the United States Supreme Court on the ground that in overruling its prior cases, the New York Court of Appeals effectively took Muhlker's property rights (the easements of light and air) in violation of the fourteenth amendment. The Court noted that prior New York precedents establishing these rights were unambiguous, and that Muhlker had bought his land and made improvements thereon in reliance on the assurances of these precedents. This coalescence of well-established property rights and Muhlker's genuine reliance on the permanency thereof meant that the New York courts could not eliminate those rights without compensation, even though as a policy matter such a holding might be advantageous to the people of the state.

In a subsequent decision, *Chicago & Alton R.R. v. Tranbarger,* 238 U.S. 67, 75 (1915), the Court held that the doctrine of *Muhlker* extended to property rights "pertain[ing] closely to the use and enjoyment of land," but not to the right to maintain artificial structures inherently inimicable to the rights of other property owners. Other cases indicated that a judicial decision does not constitute an unconstitutional taking of property unless it cannot be reconciled with prior unambiguous holdings on the subject. *Compare Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36 (1944) *with Brinkerhoff-Faris Trust & Savings Co., supra.* Only if the judicial decision is a "perverse reading of [prior] law," will the limitation on property rights effected by it be deemed an unconstitutional taking. *O'Neil v. Northern Colorado Irrigation District,* 242 U.S. 20, 26 (1916) (Holmes, J.); *see St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners,* 168 U.S. 349, 371 (1897) (the test is whether the new case is "inconsistent with or opposed to any of [the court's] former decisions").

Notwithstanding their limits, the basic principles of *Muhlker* still stand, as the concurring opinion of Mr. Justice Stewart in *Hughes v. State of Washington,* 389 U.S. 290, 294 (1967), illustrates. *Hughes* was an action by Mrs. Hughes, owner of upland property that had been conveyed by the United States prior to Washington's statehood, against the State of Washington. At issue was title to accretions which had formed over the years on Mrs. Hughes' property by the ocean. Mrs. Hughes based her case on a Washington Supreme Court decision which held twenty years previously that title to gradual accretions vested in the owner of land adjoining the ocean; however, the Washington Supreme Court in her case overruled the prior decision and held that such accretions belonged to the state.

On certiorari to the United States Supreme Court, eight of the justices concluded that the decision in Mrs. Hughes' case should be reversed on the ground that title to accretions to land granted by the United States was governed by federal, not state law, and that under the federal decisions the owner of adjacent land also owned any accretions thereto. It was the opinion of Justice Stewart, however, that federal law controlled the disposition of only those accretions which formed on Mrs. Hughes' land prior to Washington's statehood in 1889. For accretions which formed thereafter, he concluded, state law governed.

Justice Stewart was therefore forced to consider whether the reversal by the Washington Supreme Court of its prior opinion on the subject of title to accretions constituted a taking without just compensation of Mrs. Hughes' property interest in post-1889 accretions to her land. He indicated the appropriate line of analysis to be as follows:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

*Id.* at 296-97.

After a review of relevant Washington case law, Justice Stewart found the *Hughes* decision to be a completely "unforseeable" departure from prior holdings. Moreover, he said:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so

> often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . .

*Id.* at 297-98.

There is no doubt in my mind that the observations of Justice Stewart in *Hughes* and the *Muhlker* holding are fully applicable to this case. That *McBryde I* is a totally unforseeable departure from prior cases of this court on the subject of water rights I have demonstrated elsewhere in this opinion. That the private parties to this action have relied considerably on these cases I have likewise indicated. Moreover, the decision in *McBryde I* on the questions of the ownership of surplus water and the transferability of privately owned waters affects the substantial immediate enjoyment of the appellants' rights, not merely matters which are peripheral to those rights. Compare *Chicago & Alton R.R. v. Tranbarger, supra.*

*McBryde I* may or may not establish a better system for the regulation of water rights than the system that heretofore has evolved in this State. Perhaps government ownership and control of Hawaii's water resources would more effectively serve the public interest than private ownership. If this is so, then it is within the power of the State to appropriate these resources after the payment of reasonable compensation for their value. I cannot agree that it is constitutionally permissible for this court to perform the task without compensating the appellants, based exclusively on the court's perception of what is best as a policy matter for the people of Hawaii.[39]

## V. Conclusion

In accordance with the reasoning expressed in this opinion, I would overrule *McBryde I* and hold specifically as follows:

Gay and Robinson, as successor in interest to the *konohiki* of the *ilis kupono* of Manuahi and Koula, is entitled to all the normal surplus water, as defined in note 6 *supra*, of the Manuahi and Koula streams. All of the parties are entitled to the amounts of appurtenant water, as defined in note 4 *supra*, that were awarded by the trial court, except that the finding of the trial court that Gay and Robinson is entitled to appurtenant water rights for 90 acres of land in Koula and Manuahi should be aside for the reasons expressed by this court in *McBryde Sugar Co. v. Robinson*, *supra* at 189-90, 504 P.2d at 1340. McBryde is not entitled to any prescriptive water, as defined in note 5 *supra*, for the reason stated by Justice Marumoto in his dissenting and concurring opinion in *McBryde I* that "[i]n the establishment of prescriptive right to water, adverse use does not run upstream." *Id.* at 205, 504 P.2d at 1348. Storm and freshet surplus water, as defined in note 7 *supra*, is to be apportioned between Gay and Robinson, McBryde and the State, as *konohikis* of *ili kupono* and an *ahupuas* through which the water courses of the Hanapepe Valley flow, according to the principles of riparian law announced in *Carter v. Territory, supra*. Finally, the rights of the various parties to normal surplus water or appurtenant water include the right to make transfers of that water to land both within and without the Hanapepe watershed, so long as the water rights of others are not thereby prejudiced.

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[39] As stated in Miller & Lux v. Madera Canal & Irrig. Co., 155 Cal. 59, 65, 99 P. 502, 512 (1909):

> Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain.

*See also* Palmer v. Railroad Comm'n, 167 Cal. 163, 175-76, 138 P. 997, 1001-02 (1914) (statutory declaration that all running water is property of the State cannot operate retroactively to deprive landowners of riparian rights recognized under prior law); Nielson v. Sponer, 46 Wash. 14, 89 P. 155 (1907) (accord).

Because a majority of this court cannot bring itself to accept the foregoing results as correct and consistent with well-established principles of Hawaiian water law, I dissent.

# APPENDIX F

# OPINION OF THE SUPREME COURT OF HAWAII DATED JANUARY 10, 1973

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff-Appellant, Cross-Appellee, v.* AYLMER F.
ROBINSON, *et al., Defendants-Appellees,*
*Cross-Appellants.*

No. 4879

Appeal From Fifth Circuit Court
Honorable Benjamin M. Tashiro, Judge

January 10, 1973

Richardson, C.J., Marumoto, Abe,
Levinson, JJ., and Circuit Judge Ogata
in Place of Kobayashi, J., Disqualified

## OPINION OF THE COURT BY ABE, J.

This is an appeal from the judgment of the Circuit Court of the Fifth Circuit, which determined the water rights of parties who are owners of land situated in the Hanapepe Valley on the Island of Kauai. The trial lasted from May 5 through August 17, 1965. The record of this case includes transcript of testimony of witnesses comprising 3,483 pages and voluminous documentary exhibits.

In arriving at its decision, the trial court first determined the number of acres of land owned by the respective parties, which had been under taro cultivation at the time of the Land Commission Award from time immemorial, and thus entitled to appurtenant water rights. Next, the court determined the average quantity of water used per day per acre in growing taro, which it termed "duty water" to be 50,050 gallons. After the determination of these two factors, the court found that McBryde was entitled to 4,915,400 gallons per day; the State, 4,167,650 gallons; Gay & Robinson (below Koula and Manuahi) 1,533,050; and the other landowners, collectively, 1,456,950.

The trial court also concluded that McBryde by adverse use had acquired prescriptive rights to 2,084,600 gallons, and thereby McBryde could divert seven million gallons of water per day (4,915,400 appurtenant and 2,084,600 prescriptive). Inasmuch as the prescriptive right could not be deemed against the government, the court held that the amount of prescriptive right to water should be deducted from or charged against the water rights of Gay & Robinson.

The record shows that both McBryde and Gay & Robinson are diverting water from the Hanapepe River basin, so much so that the mouth of the Hanapepe River is practically dry throughout the year. Accordingly judgment was entered ordering Gay & Robinson to leave 12,624,600 gallons of water per day in the river for the use of the other owners, as above indicated.

The three principal parties, McBryde, Gay & Robinson, and the State appealed from the judgment each urging different points on appeal.

### I. Application of Territory v. Gay.

The first basic issue before us is whether the trial court was correct in adopting the opinion of Chief Justice Perry in *Terr. v. Gay,* 31 Haw. 376 (1930). Gay & Robinson urges that the decision of that case is res judicata as between the State and Gay & Robinson.

The rule of that case is that Gay & Robinson was the owner of the independent ilis[1] or ilis kupono of Koula and Manuahi; that under ancient law konohikis[2] of ilis kupono were independent of the konohiki of the ahupuaa[3] and paid no tribute to him; though he was subservient and paid tribute directly to the King, and that as owner of such ilis kupono, Gay & Robinson was owner of the normal surplus water.

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[1] An *ili* has been interpreted to mean a "land section, next in importance to ahupuaa and usually a subdivision of an ahupuaa." Pukui & Elbert, *Hawaiian Dictionary* at 91 (1971). See also Jon Chinen, *Original Land Titles in Hawaii* at 51 (1961).

Under the doctrine of res judicata "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Glover v. Fong*, 42 Haw. 560, 573 (1958).

This doctrine is recognized as a general principle formulated by the judiciary based on the obvious and practical role of reason and necessity to promote justice, fairness, expediency, and social and economic stability in our society. In other words, "[t]his general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Glover* v. *Fong, supra at* 574, quoting *Southern Pacific Railroad Co.* v. *United States,* 168 U.S. 1, 49 (1897).

Some courts have held that inasmuch as the doctrine of res judicata is adhered to by the courts as a rule of justice, it should not be applied so rigidly if to do so will be to defeat the ends of justice or to work an injustice. *Greenfield* v. *Mather,* 32 Cal. 2d 23, 194 P.2d 1 (1948); *Universal Const. Co.* v. *City of Fort Lauderdale,* 68 So. 2d 366 (1953); *People* v. *Somerville,* 245 N.E.2d 461, 42 Ill. 2d 1 (1969); *Motor Vehicle Accident Indemnification Corp.* v. *National Grange Mutual Ins. Co.,* 19 N.Y.2d 115, 278 N.Y.S.2d 367 (1967).

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[2] *Konohiki* means "a head man of an ahupuaa land division" *id.* at 153, see also Chinen at 53.

[3] *Ahupuaa* means "a land division usually extending from the uplands to the sea . . ." *id.* at 8, see also Chinen at 48.

In spite of such rule enunciated by other courts, we are reluctant to treat the doctrine of res judicata as inapplicable in this case as between the State and Gay & Robinson, even though justice may be subserved. Therefore, we hold that the rule of *Terr.* v. *Gay,* 31 Haw. 376, is binding on the State in this case.

However, as between McBryde and Gay & Robinson, and McBryde and the State, we are not faced with the doctrine of res judicata, and as between these parties, the question is whether we will follow the rule of *Terr.* v. *Gay,* 31 Haw. 376, under the doctrine of stare decisis.

We fully discussed and differentiated between these two doctrines in *Glover* v. *Fong,* 42 Haw. at 575 as follows:

> "The doctrine of res judicata is concerned with the adjudication of a cause of action or an issue and the effect of such adjudication in a subsequent action between parties to the record involving the same cause of action or issue. The doctrine of stare decisis relates to the legal principle that may be extracted from an adjudication of a cause of action or an issue and the application of such principle in a subsequent action between strangers to the record involving similar cause of action or issue. * * * When we say parties to the record, we mean persons who were parties in the action in which the adjudication was made; when we say strangers to the record, we mean persons who were not parties in such action.
>
> There is no element of estoppel in the doctrine of stare decisis because it applies only in actions between strangers to the record. If there is a contention in an action between strangers to the record that a principle for which a prior decision stands is erroneous, operates unjustly or against public interest, or is otherwise objectionable, and such contention is well taken, the court which rendered the decision may overrule it. * * * When a decision is overruled, it does not mean that the adjudication of the rights and obligations of

> the parties to the record is nullified; it only means that the legal principle contained in the decision will not be applied in the determination of a cause of action or issue in an action between strangers to the record." (Citations omitted.)

And as the United States Supreme Court said in *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940):

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula for adherence to the latest decision * * *."

*See also Humthlett v. Reeves*, 211 Ga. 210, 85 S.E.2d 25 (1954).

This court, like the United States Supreme Court, has "rejected a doctrine of disability at self-correction." *Helvering* v. *Hallock, supra* at 121. We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is the considered manifest justice.[4] In other words, there is no necessity or sound legal reason to perpetuate an error under the doctrine of stare decisis. Of course, on the other hand, we should not change a case law just for the sake of a change.

### II. State or Sovereign Rights.

In *Terr.* v. *Gay*, 31 Haw. 376, this court concluded that as Gay & Robinson was the owner of Koula and Manuahi, both deemed ilis kupono, and therefore as such owner it was also entitled to "normal daily surplus water."

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[4] See Yoshizaki v. Hilo Hospital, 50 Haw. 150, 433 P.2d 220 (1967); State v. Abellano, 50 Haw. 384, 441 P.2d 333 (1968).

Let us review the three cases which were held in *Terr. v. Gay, supra* as controlling on the issue of "normal daily surplus water."

In *Peck* v. *Bailey,* 8 Haw. 658, 671 (1867), this court said:

> "While the King owned this Ahupuaa, he had a right to apply the water to what land he pleased, but after the water courses were made, more especially after being in use from time immemorial, his conveyance of the land would include them, the same as his conveyance of land bordering on the Wailuku river will include the rights of water in said river, which had not been before granted."

However, the syllabus or headnote reads: "The owner of an Ahupuaa may apply the water belonging to it to what land he pleases," and this has been held the rule of the case.

Even assuming that it is the rule of the case, it is dictum because the controversy was among grantees of the original konohiki from whom each of them had acquired title to portions of the land in the ahupuaa of Wailuku.

It is stated in *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 680 (1904), that under ancient law "the King was the sole owner of the water as he was the rest of the land and could do with either or both as he pleased. In later years, the rule seems to have been for him not to dispossess tenants of their lands except for cause and to that extent, perhaps, he would not have deprived cultivators of the water to which their lands were by usage entitled. But no limitation, as far as we can learn, ever existed or was supposed to exist to his power to use the surplus waters as he saw fit." We believe the statement correctly states the law under ancient Hawaiian law.

Based on this premise, the *Haw. Com. & Sugar Co.* case concluded that surplus water was the property of the konohiki or chief to whom an ahupuaa had been maheled[8] and he could do with it as he pleased. This also was dictum as the controversy involved in the case was between owners of portions of an ahupuaa and did not involve the rights of konohiki against rights of others with lesser water interest.

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[8] The term *mahele* means to divide or apportion. Pukui & Elbert,

In *Carter v. Territory,* 24 Haw. 47, 70 (1917), this court said "[w]here a stream flows through a single *ahupuaa* it has been decided that as between the *ahupuaa* and *kuleanas*[6] therein, or portions of the *ahupuaa* conveyed without rights to surplus water, the surplus waters of the stream belong to the *ahupuaa.*"

On the issue as to the rights of parties in the surplus waters of a stream which flows from one ahupuaa into another, this court applied the principle of riparian rights and said "each *ahupuaa* is entitled to a reasonable use of such water, first, for domestic use upon the upper *ahupuaa,* then for the like use upon the lower *ahupuaa,* and, lastly, for artificial purposes upon each *ahupuaa,* the upper having the right to use the surplus flow without diminishing it to such an extent as to deprive the lower of its just proportion under existing circumstances." *Carter v. Territory, supra* at 70. Of course in that case the only issue related to storm and freshet water claimed by the plaintiff as against the state. However, it is too restrictive to say that the rule was only to be applicable to storm and freshet water and would not be applicable to normal surplus water.

This court in *Terr. v. Gay, supra,* reasoned that as the three cases aforementioned had held generally that konohikis of ahupuaa were entitled to surplus water, therefore,

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*Hawaiian Dictionary* at 202. See also Chinen, *Original Land Titles in Hawaii* at 55. When used in the context of land titles, reference is usually to the Great Mahele of 1848, which accomplished the division of the undivided interest in land between the King on one hand and the chief and konohikis on the other. Chinen at 7; Wells H. Hutchins, *The Hawaiian System of Water Rights* at 23 (1946), see page 10, infra.

[6] *Kuleanas* are small parcels of land within an ahupuaa. Pukui & Elbert at 165; Chinen at 54.

a konohiki of an ili kupono, which ili was independent of the ahupuaa and owed no tribute to the konohiki of the ahupuaa was likewise entitled to normal daily surplus water. In reaching this conclusion it stated that a konohiki of an ili of an ahupuaa which was a mere part of or a subdivision of the ahupuaa, owed tribute to the konohiki of the ahupuaa. On the other hand, a konohiki of an ili kupono, which was independent of the ahupuaa, owed no tribute to the konohiki of the ahupuaa, but "was subservient directly to the king." (p. 381) However, even assuming these factors, under the reasoning in *Terr.* v. *Gay, supra,* both the konohikis of the ilis of Manuahi and Koula would be subservient to the konohiki of the ahupuaa of Hanapepe, he being the King himself, the ahupuaa of Hanapepe having been retained by the King as Crown land. Thus, it would not follow that the ilis of Manuahi and Koula were independent of the ahupuaa of Hanapepe, which may have been so if the konohiki of the ahupuaa of Hanapepe had not been the King himself.

Also, the ahupuaa of Hanapepe is a very large tract of land abutting or adjoining the Hanapepe River. It would be very foolish to say the least, for the King who retained the ahupuaa of Hanapepe to convey or transfer his rights as King to all surplus water to the konohikis of the ilis "kupono" of Koula and Manuahi. Thus, in the absence of such expressed intent, it should not be deemed that the King of the mahele transferred his right to the surplus water, and therefore it should be held that the mahele of Koula and Manuahi and the subsequent Land Commission Award and issuance of Royal Patent did not transfer the King's right to surplus water.

Further, the finding that the ili of Koula was an ili kupono is not substantiated by the record. The mahele record shows that one half of Koula was maheled to Paniani and one half of Koula was retained by the King on February 1, 1848. Subsequently by Act of June 7, 1848, one half of Koula was designated as public land, a change from Crown land. It is clear to us that the designation of

"½ of Koula ili no Hanapepe"[7] shows that at least one half of Koula was not intended to be an ili kupono and therefore independent of the ahupuaa of Hanapepe, but a part of or a subdivision of Hanapepe. Thus, when one half of Koula was conveyed by the Hawaiian government on May 30, 1853 by Royal Patent Grant 1108, such conveyance of an ili of Hanapepe should not have made the whole of Koula an ili kupono, even assuming one half of Koula had been maheled to Paniani as an ili kupono. Thus, the State would be entitled to one half or so much of the surplus of the Koula Stream, as owner of the ahupuaa of Hanapepe, of which one half of Koula was a part.

More importantly, can it be said that because the King was the sole owner of all the land in the Hawaiian Kingdom and also sole owner of the water, which is considered part of the land, and because he could do whatever he wanted with surplus water, when he conveyed parcels of land to konohikis, such right of the King to surplus water became the property of the konohikis as intimated in the dicta of this court in *Peck* v. *Bailey*, 8 Haw. 658 (1867), and *Haw Com. & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 680 (1904)? To answer this question it is required that we review the Great Mahele and the laws which implemented the mahele.

By the mahele or Great Mahele,[8] Kamehameha III in 1848 proclaimed that he was sharing the lands in the Hawaiian Kingdom with his people. It is generally recognized that the mahele did not transfer title to parcels of land which had been maheled. The Land Commission Act[9] has implemented the mahele. This Act created the Board of Land Commission, often called the Land Commission, to quiet land titles and it defines the authority and function of the Land Commission. The object of the law was to have the commission make "investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired" in the Hawaiian Kingdom. The awards of the commission were to be deemed final and binding upon all parties unless appealed.

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[7] Act of June 7, 1848, L. 1848, p. 22; C.C. p. 374 RLH 1925, Volume II. Appendix, p. 2152, 2174, Koula is designated to wit: "½ of Koula, ili no Hanapepe" (meaning ½ of Koula, ili of the ahupuaa of Hanapepe).

[8] Prior to the mahele the King permitted chiefs, etc., to use certain parcels of his land. "In 1839, a course of lectures on the science of government was delivered by the Rev. William Richards to the chiefs at their request and in the same year [June 7, 1839] the Declaration of Rights, aptly called Hawaii's *Magna Carta* was adopted securing all rights of person and property." Frear, J. *The Evolution of the Hawaiian Judiciary*, pp. 5, 8 (1894).

To carry out its duties the Land Commission on August 20, 1846, adopted principles to be followed by it in quieting title to land. Both the Nobles and Representatives in the Legislative Council on October 26, 1846[10] approved the principles by resolution. The resolution also provided that "all claims for landed property * * * shall be tested by those principles, and according to them be confirmed or rejected."

As indicated in these acts, the object and duty of the Land Commission was either to confirm or reject claims of individuals to parcels of land in the Hawaiian Kingdom and title to land so confirmed was to be conveyed by Royal Patent issued by the Minister of Interior.[11]

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[9] This law was enacted on December 10, 1845 and became effective on February 7, 1846, Laws 1846, p. 107 and appears in R.L.H. 1925, Vol. II, Apendix, p. 2120. The power of the Land Commission was extended from time to time, L. 1848, p. 46, CC. 1859, p. 402; L. 1853, p. 26, CC. 1959, p. 410; L. 1854, p. 21, CC. 1959, p. 415; L. 1854, p. 25, CC. 1959, p. 416; L. 1892, p. 68.

[10] L. 1847 at 81, RLH 1925 (Appendix, Vol. II) at 2124 ff. The provisions also provided for the confirmation of titles to land under Declaration of Rights, June 7, 1839.

[11] L. 1846 at 107, RLH 1925 (Appendix, Vol. II) at 2120, 2123.

The principles specifically and most emphatically indicated that the Land Commission was only authorized to convey certain of the King's rights in land which had been bestowed upon individuals by him, to wit:

> "[H]is private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands are the following:
>
> * * * *
>
> "3rd. To encourage and even to enforce the usufruct of lands for the common good * * *."
>
> * * * *
>
> "These prerogatives, power and duties, his Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board and titles consequent upon them must be understood subject to these conditions." L. 1847, 85; RLH 1925, Vol. II, p. 2124, 2128.

We believe that the right to water is one of the most important usufruct of lands, and it appears clear to us that by the foregoing limitation the right to water was specifically and definitely reversed for the people of Hawaii for their common good in all of the land grants.[12]

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[12] It should be noted here that the leaders of the Hawaiian Kingdom were cognizant of the common law rule at the time of the enactment of the principles adopted by the Land Commission in 1845. This is indicated in the first case of Wood v. Stark reported in the Hawaiian Reports, 1 Haw. 9 (1847), wherein it also mentioned Blackstone and Kent commentaries.

Also, in Blackstone, De Luxe Edition, it is stated at 732:

> "Land.—Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehendeth in its legal signification any ground, soil, or earth whatsoever;

Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good. Therefore, we hold that as between the State and McBryde, and between McBryde and Gay & Robinson, the State is the owner of the water in the Koula Stream and Hanapepe River.

It appears that this Act was very similar to the English common law rules which had evolved by that time, that no one may acquire property to running water in a natural watercourse; *that flowing water was publici juris;* and that it was common property to be used by all who had a right of access to it, as usufruct of the watercourse.[12] *See Mason v. Hill*, 5 Barn. & Adol., 110 Eng. Rep. 692 (1833).

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as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath."

3 Kent's Comm. 401 "corporeal hereditaments are confined to land, which according to Lord Coke includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage, and water, or by the hand of man, as houses and other buildings."

[12] In *Wood v. Waud*, 3 Exc. 748, 154 Eng. Rep. 1047, 1058 (1849), the English court stated:

"Flowing water, as well as light and air, are, in one sense, 'publici juris.' They are a boon from Providence to all, and differ only in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some. When property was established, each one had the right to enjoy the light and air diffused over, and the water flowing through, the portion of soil belonging to him: the property of the water itself was not in the proprietor of the land through which it passes, but only the use of it, as it passes along, for the enjoyment of his property, and as incidental to it.

The law is laid down by Chancellor Kent, in 3 Com. 439, thus: 'Every proprietor of lands on the banks of a river has

### III. Appurtenant Rights.

The foregoing holding does not mean that McBryde and Gay & Robinson are not entitled to the use of water in the Koula Stream and Hanapepe River. It is the general law of this jurisdiction that when land allotted by the Mahele was confirmed to the awardee by the Land Commission and/or when Royal Patent was issued based on such award, such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing. *Peck* v. *Bailey,* 8 Haw. 658, 661 (1867); *Wailuku Sugar Co.* v. *Widemann,* 6 Haw. 185 (1876); *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.,* 15 Haw. 675, 691 (1904). And it would appear that the trial court only determined the appurtenant rights of the various owners of land in the Hanapepe Basin.

In its determination, the trial court found each party's "appurtenant water rights" by calculating the number of acres of land owned by the respective parties which had been under taro cultivation at the time of the Land Com-

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> naturally an equal right to the use of the water. . . . He has no property in the water itself, but a simple usufruct as it passes along.' 'Aqua currit, et debet currere,' is the language of the law; and Mr. Justice Story in *Tyler* v. *Wilkinson* (4 Mason U.S.R. 397), cited in Gale and Whatley on Easements, p. 131, lays down the same law."

Also, in *Embrey* v. *Owen,* 6 Exc. 353, 155 Eng. Rep. 579, 585 (1851), the English court held that:

> "[F]lowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who has a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only; see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

mission Award, and by multiplying the number of acres by the average quantity of water used per day per acre in growing taro, which the court found to be 50,050 gallons. Both McBryde and the State argue that the trial court failed to include certain acreage which they claim was in cultivation of taro from "time immemorial" at the time of the Land Commission Awards. They also claim that reduction of taro acreage by one third to account for fallowing was an error. The trial court's determination of the amount of acreage in taro cultivation at the time of the awards was necessarily a complex factual issue and a very difficult task, requiring weighing of conflicting expert testimony.

The trial court's task, sitting as Commissioner of Private Ways and Water Rights,[14] was to determine as precisely as possible the amount of water that was actually being used for taro cultivation at the time of the Land Commission Awards. The burden of proof was on the person asserting the right. The fact that in earlier or later times other land was in taro cultivation is irrelevant. And a reduction for fallowing should properly be made when it appears that at the time of the Land Commission Awards water was not being used to cultivate certain acreage.[15] Also, due to the difficulty and complexity of the task it would be reasonable to expect parties not favored by the findings of the trial court to attack such findings.

The Circuit Court sitting as commissioner, pursuant to HRS Ch. 664, Part III, is subject to Hawaii's Rule of Civil Procedure because such proceeding is not excepted under HRCP Rule 81(a). Here, after a review of the record, we are not convinced that a mistake has been committed. *Peine* v. *Murphy*, 46 Haw. 233, 238, 377 P.2d 708 (1963); *Klein Inc.* v. *Hotel Kaimana*, 51 Haw. 268, 269, 457 P.2d. 210, 211 (1969). Thus, under HRCP Rule 52(a) the finding of the trial court as to appurtenant water rights is not clearly erroneous and therefore it may not be set aside.

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[14] See HRS §664-31 et seq.

[15] It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible. Nevertheless, this is the law in Hawaii, and we are bound to follow it. We invite the legislature to conduct a thorough re-examination of the area.

Therefore, we affirm the trial court's finding that McBryde is entitled to 4,915,400 gallons of water per day; the State, 4,167,650 gallons per day; and Gay & Robinson, 1,533,050 gallons per day for 30.63 acres of land that it owned below Koula and Manuahi as appurtenant water rights.

The court found that Gay & Robinson was also entitled to appurtenant water rights to 90 acres of land in Koula and Manuahi based on Judge Cristy's statement in Equity 2911, First Circuit Court, appealed and reported as *Terr.* v. *Gay*, 31 Haw. 376 (1930). No such finding was made in that case and it was not necessary to make such a finding because the sole issue was the ownership of the "daily normal surplus waters." As to the claim of appurtenant water rights, Gay & Robinson had the burden of proof, but no evidence was introduced by Gay & Robinson to meet this burden. The failure of Gay & Robinson to meet this burden is also acknowledged in the Findings of Facts and Conclusions of Law (item 64), wherein it is stated:

> "Gay & Robinson is also entitled to appurtenant water rights for 90 acres of land in Koula and Manuahi, *the quantity of which can not be determined in the absence of evidence as to the duty of water.*" (Emphasis added.)

Thus, the finding of the trial court as to appurtenant water rights of 90 acres of land in Koula and Manuahi is reversed and set aside.

There is no question that appurtenant water right to taro land attached to the land when title was confirmed by the Land Commission Award and title conveyed by the issuance of Royal Patent. However, it does not follow that because McBryde is entitled to 4,915,400 gallons and Gay & Robinson to 1,533,050 gallons as appurtenant water rights to parcels of land owned by each of them in the Hanapepe Valley, they may therefore divert and transport that amount of water without the Hanapepe Valley to be used on the other parcels of land owned by them elsewhere. As the use of the word "appurtenant"[16] indicates, it is water rights which pertain to or annexed to that particular parcel of land conveyed by the original grant from the King or Hawaiian government. *Peck* v. *Bailey*, 8 Haw. 658, 661 (1867); *Wailuku Sugar Co.* v. *Widemann*, 6 Haw. 185 (1876); *Haw. Com. & Sugar Co.* v. *Wailuku Sugar Co.*, 15 Haw. 675, 691 (1904).

We hold that the right to the use of water acquired as appurtenant rights may also be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled. Thus, neither McBryde nor Gay & Robinson may transport water to another watershed, which they may have the right to use under their respective appurtenant water rights.

### IV. Riparian Rights.

McBryde, the State, and Gay & Robinson, as owners of land in the Hanapepe Valley, may have water rights other than appurtenant water rights. This court in *Terr.* v. *Gay*, 31 Haw. 376, 395 (1930), recognized such a right and said:

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[16] Webster's Third New International Dictionary: "appurtenant 1 a: annexed or belonging legally to some more important thing (a right-of-way to land or building); b. Incident to and passing in possession with real estate—used of certain profits or easements . . ."

Black's Law Dictionary, Revised Fourth Edition: "Appurtenant. Belonging to; accessory or incident to; adjunct, appended, or annexed to."

Words & Phrases—"Appurtenances as used with reference to conveyance of realty, means and includes all rights and interest in other property necessary for the full enjoyment of the property conveyed."

> "Water for domestic purposes on a lower ahupuaa is in any event assured under Hawaiian law. Every portion of land, large or small, ahupuaa, ili or kuleana, upon which people dwelt was, under the ancient Hawaiian system whose retention should, in my opinion, continue unqualifiedly, entitled to drinking water for its human occupants and for their animals and was entitled to water for other domestic purposes. At no time in Hawaii's judicial history has this been denied."

This court recognized and included this right to water for domestic purposes as part of the ancient appurtenant rights.

Now, what is this Hawaiian law or ancient Hawaiian system mentioned in the decision? This acknowledgment of the right to domestic water, we believe, was a recognition of the right guaranteed in "Enactment of Further Principles," enacted by the Hawaiian Government on August 6, 1850, Laws 1850, p. 202,[17] the pertinent portion of which provides:

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[17] The entire Act appears in RLH 1925 (Appendix, Vol. II) at 2141, 2142. A portion of this statute has been on our books since its original enactment and now appears as HRS § 7-1 and reads:

> "Building materials, water, etc.; landlords' titles subject to tenants' use. Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use."

> "The people [meaning owners of land] also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use."

Section 577 of RLH 1925, the effective statute then, contained the provision guaranteeing the right "to drinking water and to running water." It is crystal clear that the statute reserves to land owners the right to both "drinking water" and "running water." Now, what is the right to "running water" guaranteed landowners? As the right to "drinking water and running water" in artificial watercourses constructed by individuals for their own use is excepted by the statute, the term "running water" must mean water flowing in natural watercourses, such as streams and rivers. We also believe that the right to "running water" as contained therein guarantees a land owner the same flow of water in a stream or river as at the time of the mahele, without substantial diminution, or the right to flow of a stream in the form and size given it by nature. This right may be in connection with his right of laundering, canoeing, swimming, bathing, etc.

We shall next consider the possible reason for the enactment of the law. We are aware that the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts. Also, history shows that missionaries had tremendous influence among the leaders of the Hawaiian Kingdom.[13]

In *Weston* v. *Alden*, 8 Mass. 136 (1811) the Massachusetts Supreme Court recognized the right of an owner of a parcel of land adjoining a brook to use water from such brook for domestic use, including the watering of animals and irrigation of his land. Then, in *Colburn* v. *Richards*, 13 Mass. 420, 421 (1816), the Massachusetts court held that an owner of a parcel of land adjoining a natural watercourse had the right to use the water to irrigate his farm; however, it also held that he could not divert such water from the natural channel to the detriment of an owner of land below. In *Anthony* v. *Lapham*, 22 Mass. 175, 177 (1827), the Massachusetts court said "[e]very man, through whose land water passes, may use it for watering his cattle or irrigating his land, but he must use it in this latter way so as to do the least possible injury to his neighbor who has the same right." It is interesting to note that on this point the court as footnote 1 refers to 3 Kent's Commentaries (13th ed.) 439, 444.

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[13] See footnote 8.

In 3 Kent's Commentaries (13th ed.) 439, it is stated:

> "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless has has a right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debt currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above * * *."

In *Tyler* v. *Wilkinson*, 4 Mason 397, 400 (1827), in a case involving water rights of the Pawtucket River, which forms a boundary between the States of Massachusets and Rhode Island, Justice Story stated:

> "*Prima facie* every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed *usque filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. . . . The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows . . . . There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. . . . The maxim is applied, *sic utere tuo, ut non alienum laedas.*"

In *Wright* v. *Howard,*[19] 1 Simons & Stuart 190, 203 (1823), the English Chancery Court said:

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[19] It is interesting to note the similarity of the courts' holding, 3 Kent Commentaries at 439 and Tyler v. Wilkinson, *supra,* which are all contemporaneous.

> "*Prima facie,* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above."

*Mason* v. *Hill,* 5 Barn. & Adol, 110 Eng. Rep. 692 (1833), is a case where the issue was whether the defendants by diverting water, for a period of less than twenty years, had acquired right to the water by first appropriation so that the plaintiff who had been denied flow of water in a natural watercourse which flowed through his field could recover damages. The English court said "2 Blackstone's Commentaries, p. 18 'Water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it.' " (p. 700) Then it said:

> "From these authorities, it seems that the Roman law considered running water, not as a bonum vacans, in which any one might acquire a property; but as public or common, in this sense only, that all might drink it, or apply it, to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.
>
> We think that no other interpretation ought to be put upon the passage in Blackstone, and that the dicta

> of the learned Judges above referred to, in which water is said to be publici juris, are not to be understood in any other than this sense; and it appears to us there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein." 110 Eng. Rep. 692 at 701.

In *Embrey* v. *Owen,* 6 Exc. 353, 155 Eng. Rep. 579, 585 (1851) the English court said:

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only; see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

The court also said that the principle of law was established by *Wright* v. *Howard, supra, Mason* v. *Hill, supra, Wood* v. *Wood, supra,* and cases decided by American courts. It also cites 3 Kent's Commentaries 439-445.[30]

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[30] Then at page 586 it quotes extensively from 3 Kent's Commentaries, 13th ed., at 439, in fact the entire section on Running Water excepting the first paragraph. The quotation which appears there is the same as the text in 3 Kent's Commentaries, 13th ed.

In *Miner v. Gilmour*, XII Moore P.C. 131, 14 Eng. Rep. 861, 870 (1858), a case from Canada involving claims of water rights between owners of property on the opposite banks of a river, the English court in applying the doctrine of riparian rights said "[i]t did not appear that, for the purposes of this case, any material distinction exists between the French and English law."

It would appear that in the light of history and historical background of the Hawaiian Kingdom, the provision of the law enacted in August 6, 1850 which reserves to property owners the "right to drinking water and running water," was a codification or statutory enactment of the doctrine of riparian rights recognized as part of the common law by the English and Massachusetts courts.[22]

We therefore hold that under the statute a proprietor of land adjoining natural watercourses has riparian water rights. Thus, McBryde, the State, and Gay & Robinson, as owners of parcels of land adjoining the Hanapepe River or Koula Stream have such rights—the rights to use water flowing therein without prejudicing the riparian rights of others and the right to the natural flow of the stream without substantial diminution and in the shape and size given it by nature. This right is incapable of measurement into number of gallons per day. Of course, the riparian right appertains only to land adjoining a natural watercourse for its use.

### V. Prescriptive Rights

The trial court also found that McBryde was entitled to 2,084,600 gallons of water per day by adverse or prescriptive use. The general law is that one may not claim title to or interest in state-owned property by adverse use.

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[22] On this point it should be noted that the rule of McNaughten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718 (1843), which recognized insanity as a defense in a criminal case, was codified in the Hawaiian Kingdom in 1850. See HRS § 703-4.

*Re Land Title, State of Hawaii,* 49 Haw. 537, 552, 425 P.2d 83, 92 (1967); *In re Title of Kioloku,* 25 Haw. 357, 367 (1920); *Terr. v. Puahi,* 18 Haw. 649 (1908). Recognizing that prescription could not run against the government, the trial court held that McBryde's prescriptive right to water should be deducted from or charged against the water rights of Gay & Robinson. We believe this was error —if McBryde had been prescribing large amounts of water, the trial court should have ordered McBryde to cease prescribing the State's portion, not impose a double burden on Gay & Robinson by having the amount of water used by McBryde charged against Gay & Robinson. However, the issue is academic now since under our holding that the ownership of water flowing in the Koula Stream and Hanapepe River being in the State, as between McBryde and the State, McBryde acquired no prescriptive right to water.

### VI. "Normal Daily Surplus Water"

In *Terr.* v. *Gay,* 31 Haw. 376 (1930) it was decided that Gay & Robinson was entitled to "normal daily surplus water."[22] That decision was based upon the assumption that there would be a quantity of water which may be deemed "normal daily surplus water" after the water rights of all the owners of land in the Hanapepe Valley were determined; however, at that time, no determination as to the water rights of any of the owners of parcels of land in the Hanapepe Valley had been made. In a sense, the decision was made in a vacuum. Both the State and McBryde owning land abutting the Hanapepe River are entitled to riparian water rights over and above the appurtenant rights as determined by the trial court, and under the riparian doctrine they are entitled to the amount of flow of water in both the Koula Stream and Hanapepe River as water flowed in the stream and river at the time of the award without substantial diminution. In other words, they are entitled to have the flow of water in the Hanapepe River in the shape and size given it by nature. Thus, there can be no quantity of water which may be deemed "normal daily surplus water," and Gay & Robinson is entitled to nothing under the ruling of that case.

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[22] This question was the sole issue decided by the trial court and the Hawaii Supreme Court.

Also, Gay & Robinson may not claim the right to appropriate water adverse to the State's riparian and appurtenant rights because one may not claim interest in or title to State property, or right or interest by adverse use.

## VII. Rights to "Storm and Freshet" Water

We reiterate our holding under point II that title to water was reserved to the State for the common good when parcels of land were allotted to the awardee under the mahele. Thus "storm and freshet" water is the property of the State and we overrule *Carter* v. *Hawaii*, 24 Haw. 47 (1917).

## VIII. Summary

1. As between the State and McBryde, and McBryde and Gay & Robinson, the State is the owner of the water flowing in the Koula Stream and Hanapepe River. However, the owners of land, having either or both riparian or appurtenant water rights, have the right to the use of the water, but no property in the water itself.

2. The State, McBryde and Gay & Robinson have both appurtenant and riparian rights to water in connection with land within the Hanapepe Valley. However, under claim of such rights, neither McBryde nor Gay & Robinson may transport water to another watershed.

3. Under the doctrine of riparian rights, owners of land adjoining a natural watercourse have the right to a flow of a river or stream in the shape and size given it by nature. Thus, under such right there can be no "normal daily surplus" water.

4. McBryde has no prescriptive right to water, as no one may claim title or interest against property owned by the State.

5. "Storm and freshet" water is the property of the State.

Neither McBryde nor Gay & Robinson has any right to divert water from the Koula Stream and Hanapepe River out of the Hanapepe Valley into other watersheds.

Affirmed in part; reversed in part.

## DISSENTING AND CONCURRING OPINION OF MARUMOTO, J.

I dissent from the decision set forth in the last paragraph of the foregoing opinion of the court that neither Gay & Robinson nor McBryde has any right to divert the water flowing in Koula Stream and Hanapepe River to watersheds beyond the Hanapepe valley.

The decision has no relation whatsoever to the judgment appealed from in this case, and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued to this court.

In the following statement of my view of the case, I will refer to the opinion of the court in this case as the majority opinion; the majority of the justices sitting in the case as the majority; the discussion of my view as the dissent, although it contains my concurrence with the majority on some matters; Gay & Robinson as G&R; and the numbered subparagraphs of Paragraph VII of the majority opinion as items 1, 2, 3, 4, and 5.

There are two cases in the Haiwaii Reports which are related to this case. They are *Territory* v. *Gay*, 25 Haw. 651 (1920), 26 Haw. 382 (1922); and *Territory* v. *Gay*, 31 Haw. 376 (1930), 52 F.2d 356 (9th Cir. 1931), *cert. denied* 284 U.S. 677 (1931). I will refer to the earlier case as *Gay* I, and the later case as *Gay* II.

This case is a sequel to *Gay* II, which was, in turn, a sequel to *Gay* I, and represents the final phase of the controversy regarding the rights of various parties to the water originating on the lands of Koula and Manuahi, which has been in litigation for more than one-half of a century since the filing of *Gay* I.

The principal parties to the controversy at the present time are the State, G&R, and McBryde.

The State stands in the place of the Territory, as the successor in interest of the konohiki of the ahupuaa of Hanapepe, within which the ilis kupono of Koula and Manuahi are located.

G&R is the successor in interest of the konohiki of the ilis kupono and Manuahi.

McBryde is the owner of the ilis kupono of Eleele and Kuiloa, and certain kuleanas downstream in the Hanapepe valley, which are entitled to take appurtenant water from Hanapepe River.

In *Gay* I, the Territory challenged the ownership by G&R of a major portion of the land of Koula.[1] A decision in favor of the Territory would have placed the challenged portion of the ahupuaa of Hanapepe. The Territory then would have been the owner of the surplus water of that portion of the land under the prior decisions of the court which recognized the surplus water of a stream having its source in an ahupuaa as belonging to the konohiki of the ahupuaa.

This court determined the entire land of Koula to be an ili kupono belonging to G&R. There has never been any challenge to the title of G&R to the ili kupono of Manuahi. Thus, at this date, there can be no question regarding the ownership by G&R of the lands of Koula and Manuahi.

In *Gay* II, the Territory, having lost in *Gay* I, challenged the ownership by G&R of the surplus water of Koula Stream and Manuahi Stream.

The vehicle which the Territory used in the challenge was an equity suit to enjoin G&R from diverting the surplus water of the two streams to the arid lands of Makaweli. However, the right of the owner of the water, whether it be the Territory or G&R, to divert it from the watershed of origin to other watersheds was not made an issue in the case. The Territory rested its case solely on the contention that ilis kupono are of a less degree of dignity than an ahupuaa and that the primary right to the water arising in such ilis is in the owner of the ahupuaa in which the ilis are located.

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[1] The land of Koula contains 5,520 acres, covered by Grant 1108 and Royal Patent 6998 issued to the predecessors in title of G&R. Grant 1108 covers a portion containing 740 acres in the lower corner. The Territory did not challenge the ownership by G&R of that portion.

It is obvious that the right of the owner of the water to divert it from the watershed of origin to other watersheds was not raised as an issue in the case for the reason that the existence of such right was deemed to be a closed question under the prior court decisions going back to *Peck* v. *Bailey*, 8 Haw. 658 (1867), followed by *Horner* v. *Kumuliilii*, 10 Haw. 174 (1895), *Wong Leong* v. *Irwin*, 10 Haw. 265 (1896), and the Wailuku River cases litigated in *Lonoaea* v. *Wailuku Sugar Co.*, 9 Haw. 651 (1895), and *Hawaiian Commercial & Sugar Co.* v. *Wailuku Sugar Co.*, 14 Haw. 50 (1902), 15 Haw. 675 (1904), 16 Haw. 113 (1904). *Peck* v. *Bailey* sanctioned a diversion of water from one portion of an ahupuaa to another portion of the same ahupuaa; *Horner* v. *Kumuliilii* a diversion from one kuleana to other kuleanas; and *Wong Leong* v. *Irwin* a diversion from one ahupuaa to other ahupuaas.

The circuit court limited its decision to the normal daily surplus water of Koula Stream and Manuahi Stream, finding that there was no attempt by G&R to appropriate the storm and freshet water of the streams, and entered a decree denying the injunction sought by the Territory.

Upon appeal, this court affirmed the decree in a split decision, the dissenting justice being of the view that the doctrine of riparian right was applicable to the case, both with respect to normal surplus water and storm and freshet water.

I do not think that there can be any question that *Gay* II established the following: (1) the ownership by G&R of the normal surplus water of Koula Stream and Manuahi Stream; and (2) the right of G&R to divert such surplus water to areas beyond the Hanapepe valley.

*Gay II* is res judicata only as between the State and G&R. However, no party other than the Territory ever challenged the ownership by G&R of the normal surplus water of the two streams. Nor has any party ever questioned the right of G&R to divert such water from the Hanapepe valley to areas outside of the valley.

It appears that one of the principal reasons, if not the only reason, which caused McBryde to institute the instant proceeding was that, after *Gay* II, G&R began diverting the water deemed to be storm and freshet water, and also some of the water deemed to be appurtenant to the lands downstream in the Hanapepe valley, by making changes in the facilities for the diversion of the water to Makaweli, which increased the carrying capacity of such facilities from 40,000,000 gallons per day to 65,000,000 gallons per day.

The issues in this case, raised and tried in the circuit court, were: (1) the quantity of water of Koula Stream and Manuahi Stream to which McBryde is entitled as appurtenant to its lands in the Hanapepe valley; (2) the quantity of such water to which the State is entitled as appurtenant to its lands in the valley; (3) the quantity of such water to which other owners of lands in the valley are entitled as appurtenant to their lands; (4) the quantity of such water which McBryde is entitled to take under a claim of prescriptive right; and (5) the right of G&R, the State, McBryde, and other owners of lands in the valley to the storm and freshet water of Koula Stream and Manuahi Stream. Those also were the issues, and the only issues, presented and argued to this court on the present appeal.

The circuit court made its determinations on the first three issues, and also a determination of the quantity of water appurtenant to the lands owned by G&R in the Hanapepe valley. Those determinations are set forth in the majority opinion. The majority holds that they were correctly made. I concur in that holding.

On the fourth issue, the circuit court determined that McBryde has a prescriptive right to take 2,084,600 gallons per day, to be charged against the surplus water which

G&R is entitled to retain and divert. The majority holds, in item 4, that McBryde does not have such prescriptive right. I concur in that holding also, but not for the reason given therefor in item 4.

I think that McBryde has no prescriptive right because its taking was not adverse to the right of G&R to the normal surplus water of Koula Stream and Manuahi Stream. McBryde's intake points are below the diversion point of G&R. In the establishment of prescriptive right to water, adverse use does not run upstream. *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P.2d 634 (1943); *Day* v. *Hill*, 241 Ore. 507, 406 P.2d 148 (1965).

On the fifth and last issue, the circuit court determined that the storm and freshet water of Koula Stream and Manuahi Stream belonged to G&R as part of the surplus water which the owner of the land on which a stream has its source is entitled to appropriate. In item 5, the majority holds that the ownership of storm and freshet water is in the State. I do not concur in that holding; nor do I agree with the determination of the circuit court on the issue.

I would follow *Carter* v. *Territory*, 24 Haw. 47 (1917), on the matter. In that case, this court divided the surplus water of a stream into normal surplus water and storm and freshet water, and held that the doctrine of riparian right was applicable to the latter.

I think that the holding in *Carter* v. *Territory* on storm and freshet water was proper. The right to storm and freshet water was an issue in the case. But no showing was made therein regarding any Hawaiian usage on the matter. In the situation, the disposition of the issue was governed by the statutory provision presently compiled in HRS § 1-1, which declares the common law of England, as ascertained by English and American decisions, to be the common law of Hawaii, except as otherwise fixed by Hawaiian judicial precedent or established by Hawaiian usage.

The decision set forth in the last paragraph of the majority opinion involves a consideration of the doctrine of res judicata in its effect upon G&R, and a consideration of the principle of stare decisis insofar as it prevents McBryde from diverting the water appurtenant to its lands in the Hanapepe valley for use upon its lands beyond the valley.

The majority professes to recognize in the body of the majority opinion, albeit reluctantly, that *Gay* II is res judicata between the State and G&R, and holds that it is binding on the State. However, the decision effectively nullifies that holding to the extent that it denies G&R the right to divert the normal surplus water of Koula Stream and Manuahi Stream to Makaweli.

*Greenfield* v. *Mather*, 32 Cal. 2d 23, 194 P.2d 1 (1948), is cited by the majority for the proposition that the doctrine of res judicata "will not be applied so rigidly as to defeat the ends of justice or important considerations of policy."

I think that res judicata is an imperative, which commands adherence without any exception. I agree with Mr. Justice Traynor, who stated in his dissent in *Greenfield* v. *Mather* that "a departure from res judicata throws into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case"; and with Mr. Justice Edmonds, who stated in his dissent in the same case, as follows: "No doctrine in the law is more fundamental and it is vital to the orderly administration of justice. * * * Courts should stand firm against a policy of endless litigation in which nothing is ever decided with certainty."

The principle of stare decisis, which is involved in the portion of the decision which prevents McBryde from diverting the water appurtenant to its lands in the Hanapepe valley for use in other areas does not require strict adherence to prior decisions as in the case of res judicata. Nevertheless, it counsels adherence to precedents, particularly with respect to precedents relating to property rights, on the reasoning that "it is better to adhere to principles once fixed, though, originally, they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound reason." Washington, J., *Marine Insurance Co.* v. *Tucker,* 3 Cranch (7 U.S.) 357 (1806).

In deciding that McBryde has no right to divert the water appurtenant to its lands in the Hanapepe valley, the majority deems that the prior court decisions recognizing the right of the owners of water to divert the water from one area to other areas were based upon erroneous legal reasoning, and cites *Helvering* v. *Hallock,* 309 U.S. 106 (1940), in which the court declined to follow a precedent urged to be applicable.

In *Helvering* v. *Hallock* the court stated that it had "from the beginning rejected a doctrine of disability at self-correction," and, further, that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision." However, a careful reading of that case shows that the principle of stare decisis was not followed there because the precedent urged upon the court involved "collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," and also because the precedent did not contain "rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves."

I think that in Hawaii, around the prior court decisions sanctioning the diversion of water from one area to other areas, substantial interests have established themselves "by the accretion of time and response of affairs."

The record in this case shows that the water diverted from Koula Stream and Manuahi Stream by G&R is used in irrigating the sugar cane fields of Olokele Sugar Company, Limited, in Makaweli, and that the water diverted from Hanapepe River by McBryde is used in irrigating its sugar cane fields in Lawai and other areas beyond the Hanapepe valley. There is also evidence in the case that, subsequent to the decision in *Gay* II, G&R and Olokele spent approximately $119,000 and $788,800, respectively, on the system for the diversion of the water of Koula Stream and Manuahi Stream to Makaweli, and that McBryde spent $588,000 for pumping equipment in the Hanapepe valley, $226,000 for ditches and siphons to transport the water to its cane fields beyond the valley, and $60,000 for the construction of reservoir to store the water.

Although I do not have specific information at hand, I presume that, besides the parties in this case, there are other segments in the agricultural economy of Hawaii which depend upon irrigation for the cultivation of their crops, have expended substantial sums in constructing irrigation facilities in reliance upon prior court decisions, and will be adversely affected by the decision announced today.

Chief Justice Stone stated in *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533, 579 (1944):

> "To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view. But the rule of stare decisis embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. * * * The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity."

That statement was made in a dissenting opinion. However, I think that, in a case such as this, it provides a proper guide to follow.

## APPENDIX G

## DECISION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW OF THE CIRCUIT COURT OF THE FIFTH CIRCUIT, STATE OF HAWAII, AS AMENDED

S. P. No. 108

In the Circuit Court of the Fifth Circuit
State of Hawaii

At Chambers

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McBryde Sugar Company, Limited,
Plaintiff,
vs.
Aylmer F. Robinson, et al.,
Defendants.

Action To Determine Water Rights

### DECISION

#### *Jurisdiction and Pleadings*

This is a civil action for the determination of water rights. The land and water rights, the subject of this litigation, are situated on the island of Kauai within the jurisdiction of this Court. Jurisdiction is vested in the judge of the Fifth Circuit Court sitting as commissioner of private ways and water rights under Part III of Chapter 234, to wit, Sections 234-30 through 234-36, R.L. Hawaii 1955.

The complaint was filed by McBryde Sugar Company, Limited (hereinafter called "McBryde") March 24, 1959 and amended April 22, 1960. Answers were filed by the State of Hawaii (hereinafter called "the

State"), Kiyoshi Kimata, Toshio Komaki, Marcellino Francisco, Hideo Nonaka, Yuji Shimomura, Junichi Kano, Chee Kung Fui Society, Gay and Robinson and the individual partners (hereinafter called "G&R") and Olokele Sugar Co., Ltd. On September 13, 1963 default was entered as to all persons who had not appeared. The devisees of Alice Robinson and Sinclair Robinson were substituted as parties (Probate Nos. 1880 and 1991, 5th Cir. Ct.).

This is a water commissioner proceeding, and the pleadings filed herein are suffcient for adjudication of rights between all parties, without need for formal cross-pleadings between the several defendants.

## *History of Prior Litigation*

In 1927 the Territory of Hawaii brought action in the First Circuit Court against G&R, Hawaiian Sugar Company (hereinafter called "HS Co."), McBryde and the other owners of land in Hanapepe. Since it was brought in the wrong circuit it was dismissed with leave to bring it in the proper court. *Territory v. Gay,* Eq. 2856, 32 Haw. 404.

While that action was pending in the trial court the Territory brought a second action in the First Circuit Court, in which G&R and HS Co. were the sole respondents. This was tried on the merits before Cristy, J., to determine the ownership of the surplus flow and whether the Territory was entitled to an injunction against the maintenance of the dams. *Territory v. Gay,* Eq. 2911, 31 Haw. 376, 52 F. 2d 356, cert. denied 284 U. S. 677.

The gist of the above proceeding challenged the right of G&R to maintain the dams and the ownership in the surplus waters. There was left open the rights of the several owners of the lower valley entitled to water. The decision of Judge Cristy adjudicated the rights to "normal surplus" water between the State and G&R and contained 21 findings of fact (Exh. M-J-6, pp. 45-73). These findings are *res judicata* between the State and G&R.

On appeal of the above entitled case the Supreme Court of Hawaii affirmed the judgment below. The court was divided on the question whether there was any distinction between "storm surplus" and "normal surplus" and divided on the question whether the rule laid down in *Carter v. Territory,* 24 Haw. 47, should be overruled. Chief Justice Perry could see no distinction, in history, in principle, or in law between surface waters of the normal flow and surface waters which come in freshets as a result of storms, and felt that the *Carter* case, to the extent that it decides that storm surplus should be governed by the common-law riparian doctrine should be overruled. Parsons, J., was of the opinion that storm surplus was not in issue and accordingly the rule laid down in the *Carter* case should not be disturbed. Banks, J., while agreeing with the Chief Justice that the ownership of all surface waters, whether it be normal or storm, should be governed by the same rule, concluded that the rule announced in the *Carter* case is not inconsistent with preceding decisions of our supreme court, and the common-law riparian doctrine should be applied to normal as well as to storm surplus waters.

### *Issues*

The first phase of the trial was concerned with the determination of which lands owned by the respective parties were ancient taro lands or lands having ancient appurtenant water rights. The next phase of the trial involved the question of rights by adverse user or by prescription. On this issue, both McBryde and G&R agreed that rights by prescription or adverse user could not be had against the State, but that the State could acquire such rights against others. The final phase of the trial dealt with the question of water duty.

### *Findings of Fact*

#### *General Background*

1. The watershed of the Hanapepe River is about fifteen miles long and from two to five miles in width. At the upper or north portion the annual rainfall is between 400 and 500 inches. The annual rainfall decreases as the valley goes toward the sea, and at the sea the rainfall is comparatively negligible. The Koula stream joins the Manuahi stream about half way to the sea to form the Hanapepe River.

> [*Territory v. Gay,* 52 F. 2d 356, 357 (9th Cir. 1931), Map Exh. G&R-F-42, Rainfall charts Exh. M-E-16]

2. The Ahupuaa of Hanapepe, on the island of Kauai, formerly a crown land, is now one of the public lands of the State of Hawaii.

> [Exh. M-J-6: Finding No. 1 of Chisty, J., Eq. 2911, p. 49]

3. The ilis kupono of Manuahi and Koula, owned by defendants G & R, adjoin each other and together exclusively occupy all of the area of land comprising the northerly and mountainous region within the boundaries of the mauka portion of the ahupuaa of Hanapepe. Those ilis comprise the entire watershed and source of supply of all waters which would, if not diverted, find their way into the Hanapepe River makai of the junction of the Manuahi and Koula streams at the southerly boundary of those ilis.

[Exh. M-J-6: Findings Nos. 3 and 5 of Cristy, J., Eq. 2911, p. 50; Pretrial Order par. 5a, S. P. 108, 5th Cir. Ct.]

4. The ilis of Eleele and Kuiloa are ilis kupono, and are owned by McBryde; the State is the owner of the ahupuaa of Hanapepe; and the other lands within the outer boundaries of the ahupuaa of Hanapepe having water rights from the Hanapepe stream, are as set forth in Court's Exhibit "1" attached hereto and made a part hereof.

[Pre-trial Order, par. 5a, S. P. 108]

5. G&R owns kuleanas designated LCA 10458 to Alaiki, LCA 8035 to Alaiki, LCA 10457 to Namoki, all within the boundaries of Koula and LCA 9654 to Koikoi within the boundaries of Manuahi.

[Exh. G&R-C-1 through C-4]

Except for possible recurrent slight use on said bottom land for wet agriculture, the water arising in Manuahi Valley in the ili of Manuahi is not diverted, but flows out of the ili into the Hanapepe River near the southerly boundary of the ili at the junction of the Koula Stream.

[Exh. M-J-6: Finding No. 7 of Cristy, J., p. 51]

*River Flow*

6. "Total water available" as used in these findings means the amount of water that would flow through the Hanapepe River if no diversions at all were made. For the period 1934-48, the total water available may be determined by adding the amount of water flowing in the river at the junctions of Koula and Manuahi streams to the amount of water in the Koula Ditch, both of which figures are reported in the USGS Water Supply Papers.

[USGS—Water Supply Papers, Exh. M-D-12 through M-D-33]

7. The mean total water available in the years 1934-48 was 78,400,000 gallons per day.

[Exh. M-D-18 through M-D-33]

8. The maximum flow reported in the Hanapepe River below the Koula-Manuahi junction is 25,200,000,000 gallons per day on April 15, 1963.

[Exh. M-D-46, p. 18 notes]

9. Total water available is 32 million gallons per day or less ten per cent of the time. Total water available is 145 million gallons or more per day another ten per cent of the time. During the remaining eighty per cent of the time, the total water available is between 32 million and 145 million gallons per day.

[Exh. G&R-I-12, Curve B]

10. During the ten per cent of the time in the years 1934-1949, when total water available was 32 million gallons per day or less, the flow in the river below the junction of Koula and Manuahi streams was 11 million gallons per day or less. The difference of 21 million gallons per day was diverted by the old Koula ditch, which was the only diversion above the junction.

[Exh. G&R-I-12 comparison of Curves B and A; Exh. M-D-59]

*The Dam, HS Co. Lease, Etc.*

11. On October 24, 1889 G&R leased to W. R. Watson certain described premises (high table lands) in Makaweli and Hanapepe and agreed to give to the lessee the right to "take and use all the water in and of the Koula and Hanapepe and Makaweli rivers for irrigating cane and for fluming, and for mill and Plantation purposes, but only for the demised premises . . .", provided that a portion of the water taken was delivered free to G&R.

[Exh. G&R-M-1(b)]

12. On November 4, 1889 W. R. Watson assigned the lease to HS Co.

[Exh. G&R-M-3(b)]

13. Pursuant to its rights under the Watson lease and water agreement, HS Co. built dams and a system of ditches and flumes to take water from the Koula stream and certain tributaries and deliver it outside the Hanapepe Valley to the lands leased by it from

G&R for HS Co.'s use and to G&R for their use. This was completed in 1891.

[Exh. M-J-6: Finding No. 13, Cristy, J., Eq. 2911, 1st Cir. Ct.; Exh. G&R-M-1(b); Exh. G&R-E-1891; Exh. G&R-F-8]

14. A portion of the water arising in the Koula Valley from a watershed lying within part of the ili of Manuahi and the remainder within the ili of Koula is impounded by dams, approximately five feet high, across the two main tributaries of the Koula stream, together with a lesser dam and a series of flume catchments under the falls on other tributaries of the Koula stream in the same vicinity (hereinafter collectively called "the dams") about three miles north of the southerly boundary of the ili of Koula and situated wholly within the ili of Koula.

[Exh. M-J-6: Finding No. 8, Cristy, J., Eq. 2911, 1st Cir. Ct., p. 51; View of area]

15. A portion of the water impounded by the dams and collected by the flume collection system built by HS Co. was until March 30, 1949 diverted from the watershed of the Hanapepe River by means of a system of ditches, piping and flumes, originally consisting of 1,017 feet of tunneling, 16,100 feet of ditching, 12,300 feet of fluming, and 5,570 feet of 40-inch piping from the head dam to the point of crossing out of the Hanapepe Valley, a distance of 6¾ miles. Of the ditching, about two miles were orignally cut through solid rock, the rest in rotten rock and earth. This ditch, flume, tunnel and pipe water diversion system was generally known as the "Hanapepe

ditch," though called the "Koula ditch" by G&R, and was physically situated inside the palis and along the course of the Koula Stream and Hanapepe River from the head dam to its point of crossing out of the Hanapepe Valley through the makai siphon located immediately down stream from L.C.Aw. 9265 to Kipani.

[Exh. G&R-F-8; Exh. G&R-E-1891; Exh. M-C-7; Exh. M-D-57; Test., R. H. Cox]

16. The development of the Koula water by HS Co. with the assistance of G&R, was begun and maintained openly under a claim of right and title to such waters, over and above prescriptive rights, by reason of the ownership by G&R of fee simple title to the area comprising the watershed.

[Exh. M-J-6: Finding No. 17, Cristy, J.]

17. The development of the diversion of waters, as continuously maintained in Koula Valley, was the result of very substantial capital expenditure on the part of both G&R and HS Co.; that the development of water supply was a necessary condition precedent to creating this sugar plantation; and that the government has continually collected taxes from G&R and HS Co. on the basis of the enhancement of values of their holdings attributable substantially to the development and use of irrigation from the Koula Dams.

[Exh. M-J-6: Finding No. 20, Cristy, J.]

18. The diversion system built by HS Co. leaked substantial amounts of water from shortly after its construction to the time of discontinuance of its use

by G&R on March 30, 1949. Much of that leakage found its way back into the Koula Stream and Hanapepe River.

> [Test., Ah Yet Dang; Exh. M-J-20, pp. 19, 36; Exh. M-C-7; Exh. M-D-57; Test., C. Christopher; Test., Doak Cox; Exh. M-K-56, p. 1; Exh. G&R-E-1910, pp. 7-8; Exh. G&R-E-1914, p. 9; Exh. G&R-E-1925, p. 16; Exh. G&R-E-1930, p. 5; Exh. G&R-E-1932, p. 4]

19. The proportion of the Hanapepe Ditch waters which G&R were entitled to receive free under G&R's agreement with HS Co. was to be determined by the ratio between the G&R and the HS Co. sugar cane lands.

> [Exh. G&R-M-1(b); Exh. G&R-M-5(b); Test., Aylmer Robinson, August 3, 1965]

20. (a) Prior to December 31, 1938 G&R were entitled to receive as their share slighly less than one-third of the waters delivered by the Hanapepe Ditch into Makaweli; (b) Between January 1, 1939 and December 31, 1941 G&R were entitled to receive as their share slightly more than one-third of the waters delivered by the Hanapepe Ditch into Makaweli.

> [Exh. G&R-M-1(b); Exh. G&R-M-5(b), and:
> (a) Exh. G&R-E-1937, pp. 5, 7;
> (b) Exh. G&R-E-1939, pp. 6, 8]

21. After December 31, 1941, G&R operated and controlled the Hanapepe Ditch, and leased land and water to Olokele Sugar Company, Limited, retaining

to itself 43% of that water; such lease providing that in case the water of the Koula Ditch was reduced as a "result of litigation", an alternate supply would be developed by G&R for use by Olokele.

[Exh. M-I-27, pp. 25, 28]

22. By the agreement entered into on February 21, 1930, a substantial revision was made with respect to control and ownership of the waters in the Koula stream below the dams.

[Exh. G&R-M-24]

23. All waters in the Koula stream below the dams, however arising (whether from springs, rainfall, tributary streams, water never impounded by the dams, or water returning to the stream through seepage or leakage from the Hanapepe Ditch), were an indistinguishable part of the flow of that stream. Such waters, to the extent that the same were claimed by G&R to be normal daily surplus, were under the control and ownership of G&R; and any right that HS Co. may have had prior to February 21, 1930 to terminate such control and ownership by taking such waters below the dam for use upon the premises leased to them at Makaweli was relinquished to G&R on that date.

[Exh. G&R-M-24]

24. The practical effect of the agreement of February 21, 1930 was a relinquishment by HS Co. of its right to terminate G & R's control and ownership over any waters flowing in the Koula stream below the dam, since G&R was acknowledged to have the

right to develop any of such waters flowing in the Koula stream below the dam.

[Exh. G&R-M-24]

25. G&R's lease and water agreement with HS Co. (the Watson lease) expired by its terms on December 31, 1938.

[Exh. G&R-M-1(b)]

26. On June 17, 1937, substantial amendments and changes were made in the terms of the Watson lease, and the lease was extended for an additional two-year term from the expiration of the original term thereof.

[Exh. G&R-M-25; G&R-E-1937, pp. 10, 11]

27. On March 3, 1939 the Watson lease was further extended for one year from the expiration of the first extension thereof.

[Exh. G&R-B-3]

28. The HS Co. lease (Watson lease) was extended unto December 31, 1941 (Exh. G&R-M-25, and G&R-B-3 and G&R-B-4). In 1941 G&R assumed control and operation of the ditches and flumes of the old Koula Ditch and of the dams.

29. The old Koula Ditch as built and operated by HS Co. passed along the west side of Koula Valley, then crossed to the east side, where it passed through lands belonging to G&R and lands belonging to the Territory lying to the east of Hanapepe Valley, to a point where it was siphoned across Hanapepe Valley to Government lands lying to the west of the valley, and then entered Makaweli a short distance east of Hanonui Valley.

*G&R's Diversions*

30. From 1945 through 1949 G&R and Olokele realigned stretches of the old Koula Ditch so as to eliminate all portions lying on lands belonging to others than G&R, some of which were leaky and deteriorated. The realigned ditch consists of 1) an upper stretch which was the upper part of the old Koula ditch; 2) a new middle stretch, consisting principally of a tunnel through the ridge between Manuahi and Koula, a siphon across Manuahi, and a tunnel through the hills to the southwest of Manuahi, and 3) a lower stretch, which was the lower portion of the old Koula ditch on Makaweli. The new system of tunnels, sometimes referred to as the "Hanonui tunnel system", runs solely along and through the lands of G&R. On March 28, 1949, G&R opened for use this new Hanonui tunnel system for diversion and delivery to its land at Makaweli (in part leased to Olokele Sugar Company) of waters of the Koula and Manuahi streams and their tributaries impounded by its dams in Koula.

31. The old Koula ditch could and did carry at least 40,000,000 gallons per day (gpd). The realigned Koula Ditch has a capacity of 65,000,000 gpd (Exh. M-D-56). Since the dams which divert water into it are the same identical dams which fed the old Koula ditch, the greater capacity of the new ditch effects an increase in the amount it actually carries only at times of high water.

32. Since the opening for use of G&R's Hanonui tunnel system on March 28, 1949, the amount of water

effectively taken by G&R from the Hanapepe River and its tributaries has been substantially increased, and McBryde has been unable to take from the stream the amounts of water which it had taken continuously under an alleged claim of right for the measured period January 1, 1934 through March 30, 1949.

33. The County of Kauai diverts an average of about 225,000 gpd from the Hanapepe River at its water works about 1200 yards below the Koula-Manuahi junction.

34. Major ancient ditch systems which are still partly in use in the lower part of Hanapepe Valley are (reading from mauka to makai according to the position of the intake from the Hanapepe River):

(a) The Keana-a Ditch, sometimes called Keahi Ditch, on the east or Wahiawa side of the river;

(b) The Kaauwaikahi or Auwaikahi Ditch on the west or Makaweli side of the river; and

(c) The Kapili Ditch on the east side of the river.

For many years McBryde has been one of the persons taking water from the Keana-a, Kaauwaikahi and Kapili ditches.

35. In 1959, McBryde made substantial changes in these ditches. It enlarged and realigned the Keana-a Ditch and built a new dam and intake for it somewhat makai of its old dam and intake. This enlarged and realigned Keana-a Ditch is now known as the "Hanapepe Intake Ditch". It also built a ditch and siphon across the river, known as the "Farmers' Ditch", which feeds water from the Hanapepe Intake Ditch

into the Kaauwaikahi Ditch. The Kapili Ditch is also connected to the Hanapepe Intake Ditch.

36. McBryde constructed and maintained three pumps in the Hanapepe Valley on the east side of the river, known as Pumps 1, 2 and 3, the numbers running from makai to mauka.

The present diversion dams across the river and its tributaries, reading from mauka to makai, are:

(a) G&R's dams in Koula referred to above, built in or before 1900.

(b) McBryde's Hanapepe Intake Ditch dam, built in 1959. This dam diverts all the water which reaches it when the flow of water reaching it is 50,000,000 to 60,000,000 gpd or less.

(c) McBryde's Pump 2 dam, built before 1934. It diverts whatever water reaches it in dry weather.

(d) McBryde's Pump 1 dam, built about 1900. A road crosses the river on top of this dam, which is sometimes referred to as the "Kailiili Crossing". It diverts whatever water reaches it in dry weather. Below this dam the river is tidal and its surface is at sea level.

[Exh. M-D-58]

37. On June 29, 1965, the day on which this Court visited Koula, the "total water available" was 66,800,000 gallons, of which 44,200,000 flowed in G&R's realigned Koula Ditch and 22,600,000 in the river at the Koula-Manuahi junction. (Test., Russell Smith, July 20). Only a relatively small quantity was passing over the Koula dams (View by Court: Exh. G&R-K-28), from which the Court concludes

that the Koula dams divert whatever water reaches them up to about 30,000,000 to 40,000,000 gpd, the exact amount depending on whether the flow reaches them at an even rate throughout the day or not. For instance, the total diversion in one day would be greater if the water reached the dams at an even rate of 2,000,000 gallons per hour (equivalent to 48,000,000 gpd) for twenty-four hours than if the same total amount of water reached them at 1,000,000 gallons per hour (equivalent to 24,000,000 gpd) for twelve hours and 3,000,000 gallons per hour (equivalent to 72,000,000 gpd) for the next twelve hours.

38. On November 11, 1964, total water available was 115,500,000 gallons, of which 45,500,000 flowed in G&R's realigned Koula Ditch, and 70,000,000 in the river at the Koula-Manuahi junction. A comparison with the figures for June 29, 1965, shows that the difference in the amount of water diverted into the ditch was 1,300,000 gallons, or 2.7% of the 48,700,000 difference in total water available. The Court, therefore, concludes that when the water reaching the Koula dams rises above them, they divert about 2.7% of the additional water into the realigned Koula Ditch.

39. The total water carried by the realigned Koula Ditch is limited by its capacity of 65,000,000 gpd. The Court, therefore, concludes that the realigned Koula Ditch diverts the first 30,000,000 to 40,000,000 gpd that reach the Koula dams, plus 2.7% of any additional water that reaches them, up to a total diversion of 65,000,000 gpd.

40. McBryde's Pumps 1, 2 and 3 pump water up the east pali of Hanapepe Valley to McBryde's lands lying as far away as Lawai.

[Test., R. C. Cox, July 1-2, 1965; Exh. M-D-58]

41. McBryde's Pumps 2 and 3 pump water which comes from the Hanapepe River via the Hanapepe Intake Ditch. McBryde's Pumps 1 and 2 have intakes directly from the Hanapepe River.

[Exh. M-D-58]

42. McBryde's pumps are connected with underground tunnels as well as the river (Exh. G&R-F-49). As originally built, these tunnels drew water from the alluvial soil and gravel in the bottom of Hanapepe Valley, which probably reduced the flow in the river to some extent. However, in about 1930, the extension of these tunnels into the "country rock" to the east of Hanapepe Valley struck a lava tube which supplies a large proportion of the water which is pumped by pumps 1, 2 and 3.

[Test., R. C. Cox, Doak Cox; Exh. G&R-F-49]

43. Because the "country rock" is hard and relatively impervious, very little, if any, of the water in the lava tube would naturally reach the Hanapepe River. After the tapping of the lava tube, McBryde's tunnels were sealed so that they draw water only from the lava tube, and not from the alluvial fill of the valley.

[Test., R. C. Cox, Doak Cox; Exh. G&R-F-49]

44. In addition to the water which it takes from the Hanapepe Intake Ditch through Pumps 2 and 3, McBryde takes water from the Hanapepe Intake

Ditch, both directly, and through the Farmers' Ditch and Kaauwaikahi Ditch, to irrigate its sugar lands in Hanapepe Valley.

[Test., R. C. Cox]

45. Certain farmers take water from the Hanapepe Intake Ditch and the Kaauwaikahi Ditch to irrigate their lands for taro and other crops. Certain of these lands are owned by the State and G&R.

46. In the years 1934-1959, the water supply system in the lower Hanapepe Valley was generally the same as the present system described above, except that the Keana-a and Kapili ditches were used instead of the Hanapepe Intake Ditch, and Kaauwaikahi Ditch drew its water directly from the Hanapepe River.

47. There is no evidence of the respective quantities of water drawn by McBryde and the farmers for use in Hanapepe Valley, either before or after 1959.

48. The fact that McBryde was taking waters from Hanapepe stream for use in part on its plantation outside Hanapepe Valley was a matter of common knowledge in the community during the measured period, 1934-March, 1949.

49. Over the measured period 1934-March, 1949, McBryde took waters daily from Hanapepe stream.

[Exh. M-E-9]

50. McBryde's takings of water varied with the needs of its plantation, more water being taken in the drier summer months than in the wetter winter months.

[Exh. M-E-14]

51. Actual notice of McBryde's claim of ownership of water was given to G&R by the service of McBryde's Crossbill in Eq. 2856 on G&R in 1927.

[Exh. M-J-2]

52. In 1927, in its Petition for Perpetuation of Testimony (S. P. 23, Fifth Circuit Court) G&R admitted that McBryde claimed an interest in the normal surplus-waters of Koula and Manuahi antagonistic to the claim of ownership and right of possession, control and use of said waters by G&R.

[Exh. G&R-G-3, petition, par. IV]

53. Actual notice of McBryde's claim of ownership by prescription of all the water it was then and had been taking was again given on June 8, 1938 and again on June 30, 1938 by the delivery to G&R's attorney of letters from the attorney for McBryde, which letters were received a few days after their respective dates by G&R.

[Exh. M-M-4, June 8, 1938 attachment; Exh. M-M-5; Test., Aylmer Robinson, August 2, 1965]

54. McBryde claimed to be the alleged owner of and entitled to take all the waters it actually took over the measured period 1934-March, 1949.

[Exh. M-J-2; Exh. M-M-4, June 8, 1938 attachment; Exh. M-M-5]

### *Diversions 1934 through 1949*

55. Daily records of diversions from the river by G&R and McBryde were introduced in evidence for the years 1934-1948, and January-March 1949.

[Exh. M-D-18 through 34 and M-E-9]

These diversions were summarized in graphs known as "duration discharge curves" showing the amounts of water available and the amounts diverted during each percentage of the period 1934–March, 1949. These curves show that during the percentage of this period of time shown in column (a) below, flow and diversions were at least the figure shown opposite that percentage in the other columns.

| Percentage | Total Water Available | Koula Ditch | River USGS | McBryde | Total Diversions |
|---|---|---|---|---|---|
| (a) | (b) | (c) | (d) | (e) | (f) |
| 100 | 20 | 15.5 | 4.5 | 2.0 | 17.5 |
| 95 | 29.5 | 19.5 | 10 | 8.6 | 28.1 |
| 90 | 32 | 21 | 11 | 10.0 | 31 |
| 80 | 36 | 22 | 14 | 12.3 | 34.3 |
| 70 | 40.5 | 24– | 16.5 | 14.7 | 38.7 |
| 60 | 45 | 25 | 20 | 17.0 | 42.0 |
| 50 | 50 | 25 | 25 | 19.6 | 44.6 |
| 40 | 60 | 27.5 | 32.5 | 22.0 | 49.5 |
| 30 | 70 | 26.5 | 43.5 | 25.0 | 51.5 |
| 20 | 85 | 20 | 65 | 28.3 | 48.3 |
| 10 | 145 | 30 | 115 | 33.0 | 63.0 |
|  | G&R-I-12 Curve B | Column (b)-(d) | G&R-I-12 Curve A | M-E-1(a) | Column (c)+(e) |

For example, total water available was at least 45 million gallons per day (mgd) 60% of the time. The figures for 100% of the time are close approximations for McBryde's and G&R's ditches were shut down on a very few days in this period.

Column (c) shows the amount of water in the river at the USGS gauge below the Koula-Manuahi junction, and represents the total water available after the Hawaiian Sugar Co.-G&R diversions.

Comparison of the above figures, and the duration discharge curves from which they are read, reveals that during the 30% of the time when the total water available was 70 mgd or less, McBryde's diversions took nearly all the water left in the river after the Koula ditch diversions. Thus, during this 30% of the time, the Koula ditch diversions effectively limited the amount McBryde was able to take. During the remaining 70% of the time, total water available was sufficient to satisfy the diversions of G&R and McBryde, with a substantial quantity left over.

It is evident that in times of low water during 1934-49, HS Co., and later G&R, diverted a substantial quantity of water thereby cutting the water available to McBryde to less than 7 mgd. Evidence of five such periods in the years 1934-49 was pointed out. (G&R-I-18 through I-22)

| | McBryde Diversion | |
|---|---|---|
| Date | Exh. M-E-9 | Exh. G&R-I-18 through I-22 |
| June 11-18, 1935 | 10.5- 6.5 mgd | 9.5- 9.7 mgd |
| June 9-16, 1936 | 10.5- 7.5 mgd | 9.5- 8.6 mgd |
| September 29-October 5, 1939 | 9.5- 7.0 mgd | 9.5- 8.3 mgd |
| April 21-30, 1941 | 8.5-10.0 mgd | 10.4- 9.6 mgd |
| March 3-7, 1942 | 10.0- 9.0 mgd | 10.2- 7.7 mgd |

Each of these five periods has the following characteristics, namely, that rainfall in the Makaweli and McBryde sugar plantation areas, as reported by the United States Department of Agriculture, always averaged less than half, and usually much less, of the rainfall to be expected in those places at that time of year on the basis of many years' records. (G&R-I-2

through I-3, I-5 through I-9, I-18 through I-22). This demonstrates that these were periods when the need was particularly pressing.

### *Lands Having Appurtenant Water Rights*

56. The parties actively participating in the trial (McBryde, the State, and G&R) agreed on the areas of wet land entitled by appurtenant right to water for taro cultivation which are found within certain parcels of land in Hanapepe Valley and its tributaries. The Court finds these figures are correct. Under each party's name is listed the designation or description of the parcel of land, and the area of wet land in which the named party owns appurtenant water rights is set forth below.

**McBryde Lands**

| Item No. (Ex. M-C-58(a)) | Description | Ancient Taro Acreage |
|---|---|---|
| 1 | L.C.Aw. 10016 Apana 2 to Lono | 0.65 acre |
| 2 | L.C.Aw. 9232 Apana 1 to Kaaaaoloa | 0.58 acre |
| 3 | L.C.Aw. 7631 Apana 1 to Kelemoku (portion) | 1.20 acres |
| 4 | L.C.Aw. 8182 to Heau | 0.70 acre |
| 5 | L.C.Aw. 8254 Apana 1 to Haoleki | 0.43 acre |
| 6 | Portion L.C.Aw. 8254 Apana 2 to Haoleki | 0.53 acre |
| 7 | Portion L.C.Aw. 7321B to Kualeho | 0.81 acre |
| 8 | L.C.Aw. 10922 to Ula | 2.48 acres |
| 9 | L.C.Aw. 7922 to Kapaehaa | 6.96 acres |
| 11 | Kam IV to Aihoi Apana 2 | 0.53 |

## McBryde Lands

| Item No. (Exh. M-G-53(a)) | Description | Ancient Taro Acreage |
|---|---|---|
| 12 | L.C.Aw. 3284 Apana 1 to Wahineaea | 1.30 acres |
| 13 (Ili of Kuiloa) | L.C.Aw. 5572 Apana 3 to Kaaha | |
| | Section A | 1.20 acres |
| | Section B | 5.80 acres |
| | Section C | 3.00 acres |
| 14 | L.C.Aw. 3284 Apana 4 to Wahineaea | 1.13 acres |
| 16 | L.C.Aw. 9029 to Kaohulihau | 0.91 acre |
| 17 | L.C.Aw. 8198 to Kamano | 0.70 acre |
| 18 | L.C.Aw. 8036 to Aihoi | 1.20 acres |
| 19 | L.C.Aw. 3284 Apana 3 to Wahineaea | 1.95 acres |
| 21 (Ili of Eleele) | L.C.Aw. 7712 Apana 5 to Kekuanaoa | |
| | Section G | 6.71 acres |
| | Section H | 4.53 acres |
| | Section I | 2.13 acres |
| | Section K | 2.32 acres |
| | Section R | 0.90 acre |
| 23 | Und. Int. L.C.Aw. 5309 to Kanakamaikai | 11.03 acres |
| | Und. Int. L.C.Aw. 5447 Apana 1 to Nuanua | |
| | Und. Int. L.C.Aw. 5447 Apana 3 to Nuanua | |
| | L.C.Aw. 7928 Apana 1 to Maluaikoo | |
| | L.C.Aw. 7928 Apana 2 to Maluaikoo | |
| | Und. Int. L.C.Aw. 9135 Apana 1 to Kalepona | |
| | L.C.Aw. 10010 to Makahiki | |
| | L.C.Aw. 10526 to Naloheelua | |
| | M. Aw. 19-B to Kanehiwa | |
| | | 59.68 acres |

| | State Lands Government Lot No. | Ancient Taro Acreage |
|---|---|---|
| Exh. No. 32(a) | 4 | 1.10 acres |
| | 5 | 3.00 acres |
| | 6A | 1.10 acres |
| | 6B (Gr. 1149) | 0.26 acre |
| | 7 | 4.10 acres |
| | 8 | 2.50 acres |
| | 9 | 7.50 acres |
| | 11 | 2.00 acres |
| | 14 | 1.00 acre |
| | 15 | 0.70 acre |
| | 18 | 1.00 acre |
| | 19 | 1.14 acres |
| | 21 | 4.25 acres |
| | 22 | 4.10 acres |
| Exh. No. 32(b) | 24 | 5.60 acres |
| | 25 | 2.20 acres |
| Exh. No. 32(c) | 26 | 3.30 acres |
| | 27 | 6.20 acres |
| | 28 | 0.70 acre |
| | 30 | 1.70 acres |
| | 31 | 1.80 acres |
| | 35 | 0.40 acre |
| | 36 | 0.90 acre |
| Exh. No. 32(e) | 39 | 3.50 acres |
| | 40 | 1.30 acres |
| Exh. No. 32(f) | 47 | 1.16 acres |
| | 48 | 0.10 acre |
| | 50 | 0.25 acre |
| Exh. No. 32(a) | 54B Gr. 10832) | 0.14 acre |
| | 55 (SSA 54910) | 0.41 acre |
| | LCA 9116:1 | 0.24 acre |
| | | 63.65 acres |

**G&R Lands**

| Designation | Wet Land Acreage |
|---|---|
| LCA 5447 :3 to Nuanua | 0.75 acre |
| LCA 7993 :1 to Pala | 0.79 acre |
| LCA 8020 :1 to Asa Kapoi (G&R portion) | 0.49 acre |
| LCA 8077 :2 to Hii | 1.21 acres |
| LCA 8123 to Holeka | 0.47 acre |
| LCA 9135 :1 to Kalepona | 0.57 acre |
| LCA 9142 :1 to Kapekue (G&R portion) | 0.43 acre |
| LCA 9190 :1 to Kupia (G&R portion) | 1.70 acres |
| (G&R reserved water rights portion) | 0.89 acre |
| LCA 9283 :2 to Keliinui | 0.56 acre |
| LCA 10069 to Maluihi | 0.80 acre |
| LCA 10274 to Palahe | 0.83 acre |
| LCA 10312:1 to Namaielua | 1.14 acres |
| LCA 11011 to Makaiku | 1.00 acre |
| | 11.63 acres |

[Tr. pp. 1044-45 and 1062]

57. The three parties represented at the trial also agreed that the wet land areas of other private owners totaling 29.11 acres shown in Court's Exhibit "2" which is hereto attached and made a part hereof, and as shown in G&R Exhibit G-4 under the heading "*Exhibit E* Taro Land of Other Private Owners", are correct. The Court finds these figures are correct.

58. McBryde and G&R agreed and G&R's witness Roswell Towill testified that the area of wet lands with appurtenant water rights for taro belonging to G&R within certain parcels of land is as follows:

G&R Lands

| Designation | Wet Land Acreage |
|---|---|
| LCA 3284 :2 to Wahineaea | 1.95 acres |
| LCA 5309 to Kanakamaikai | 0.93 acre |
| LCA 5447 :1 to Nuanua | 0.32 acre |
| LCA 5447 :2 to Nuanua | 0.21 acre |
| LCA 6578 :2 to Paele | 1.39 acres |
| LCA 7919 to Kaiahauna | 3.06 acres |
| LCA 8020 :2 to Asa Kapoi (G&R portion) | 0.63 acre |
| LCA 8077 :3 to Hii | 0.46 acre |
| LCA 9265 to Kipani | 3.10 acres |
| LCA 10275 to Makaino | 0.39 acre |
| LCA 10349 to Nakapa | 3.93 acres |
| LCA 10678 :1 to Pua | 0.78 acre |
| LCA 11068 to Wailele | 1.85 acres |
|  | 19.00 acres |

While the State did not join in this agreement, it introduced no evidence to contradict these areas which the Court finds correct.

59. The evidence shows that there is a substantial area of wet land in Koula and Manuahi valleys having appurtenant water rights for the cultivation of taro. The only evidence giving the total acreage of this wet land is Findings of Fact No. 6 of Cristy, J. in *Territory v. Gay* (1st Cir.) Eq. 2911, which places the acreage at "approximately 90 acres." This finding was made in litigation between the predecessors in interest of the State and G&R, and was introduced in evidence in this proceeding by McBryde. There is no evidence tending to contradict it, and this Court adopts it as its finding.

60. [As amended R7-251-250] The remaining areas claimed by McBryde, and the State, as their wet lands having appurtenant water rights for taro cultivation, were disputed by G&R. For the sake of con-

sistency in the matter of the standard of proof required, and taking into consideration the probable standard of proof adopted by Judge Cristy for the determination of taro lands in formulating his Finding No. 6 in *Territory v. Gay* (1st Cir.) Eq. 2911, as shown in Finding No. "59" above, and also taking into consideration the standard fixed herein as being the right to water in the quantity which was customarily used on the land at and immediately before the date of the award or grant, the Court finds that the following disputed lands are wet land taro areas:

**McBryde Lands**

| Item No. (Exh. M-C-53(a)) | Description | Ancient Taro Acreage |
|---|---|---|
| 13 | L.C.Aw. 5572 Apana 3 to Kaaha | |
| (Ili of Kuiloa) | Section E | 4.00 acres |
| 15 | Portion L.C.Aw. 10271 Apana 1 to Makailio | 2.49 acres |
| 20 | L.C.Aw. 11011 Apana 1 to Palama | 1.17 acres |
| 21 | L.C.Aw. 7712 Apana 5 to Kekuanaoa | |
| (Ili of Eleele) | Section J | 8.33 acres |
| | Section L (portion) | 4.68 acres |
| | Section M | 4.30 acres |
| | Section N | 6.22 acres |
| | Section O | 5.99 acres |
| | Section P | 0.47 acre |
| | Section Q | 0.88 acre |
| | | 38.53 acres |

**State Lands**

| | |
|---|---|
| Government Lot 10 | 9.80 acres |
| Government Lot 12A | 3.30 acres |
| Government Lot 13 | 2.00 acres |
| Government Lot 37 | 4.02 acres |
| Government Lot 45 | 0.50 acre |
| | 19.62 acres |

61. [As amended R7-249] There is not sufficient evidence to support a finding by this Court that any of the other disputed areas were cultivated in wet land taro at about the time of the Land Commission awards or Mahele.

In summary, the lands of the various parties entitled to appurtenant water rights are:

| | |
|---|---|
| McBryde | 98.21 acres |
| State | 83.27 acres |
| G&R Koula & Manuahi | 90.00 acres |
| Below Koula & Manuahi | 30.63 acres |
| Others | 29.11 acres |
| | 331.22 acres |

The figures set forth in above findings represent the Court's findings of the areas of wet taro land at and immediately before the time of the Land Commission Awards in Hanapepe, which occurred in the years 1851-1855. In arriving at these findings, the Court has found that the relevant evidence has varying degrees of probative value.

For the purpose of determining which lands were entitled to appurtenant water rights, McBryde, the State and G&R, through their expert witnesses, namely, surveyors for the respective parties, used the same guide lines. Differences of opinion were primarily on the weight to be given to each of these guide lines. The areas of dispute centered on the questions of whether the *auwais* shown on Government Registered Map, Exh. M-C-7, were ancient *auwais* as claimed by McBryde and the State, or new *auwais* as claimed by G&R as having been built by Chinese rice planters.

At the conference of surveyors (representing McBryde, the State, and G&R), as well as during the course of the trial wherein each of the surveyors representing the parties at the trial testified, all parties, in nearly all cases, used the following guide lines for the proof of ancient taro lands:

(1). *Land Commission Awards and Royal Patents.* The descriptions in the land commission awards were based on surveys by the Land Commission surveyors and the testimony before the Commission. The land commission awards also describe the use of lands adjoining the lands awarded. These descriptions are part of the metes and bounds descriptions, and are based on the survey by the Commission's surveyors and the testimony before it. They are thus eyewitness descriptions made either contemporaneously with the awards of the adjoining lands, or within four years of them, and are entitled to great weight.

Where the descriptions in these documents called for "aina kalo", taro land; "loi", taro patch; "koele", taro lands of the konohikis where hoainas had to labor for certain periods; "auwai", ditch; or "moo", agricultural land[1]; the subject land and the adjoining lands were conceded to be taro lands.

(2). *Auwais.* The ancient taro patches being irrigated by a system of ditches, where the *auwai* was identified, described, sketched or called for in a Land Commission Award or Royal Patent, all parties generally conceded that lands adjoining thereof were ancient taro lands.

---

[1] Though such lands were not necessarily taro land, the surveyors were in agreement that in Hanapepe Valley "moo" meant wet taro lands.

Proof of ancient *auwais* were also sought by the use of testimonies of kamaainas perpetuated in 1927 on Kauai in contemplation of Hanapepe water rights litigation. All of these witnesses were called by G&R.

(3). *Topography.* Where the land was level, fertile, and at an elevation where water from *auwais* and adjoining *lois* was available, the parties generally conceded the lands to be ancient taro lands. The dispute regarding this guide line was whether the *auwai* was an ancient *auwai* and whether the land was at such an elevation so that it was capable of being irrigated by an ancient *auwai.*

(4). *Perpetuation of Kamaaina Testimony of 1927.* G&R in contemplation of a suit to determine water rights in Hanapepe Valley, by order of the presiding judge of the Fifth Circuit Court, held hearings from July 7 to July 16, 1927, for the purpose of perpetuating the testimony of seven persons.

The surveyors involved all made extensive use of the kamaaina testimony of 1927. Where the kamaainas in 1927 referred to the land as taro land, the parties did not dispute the fact. Primarily, the dispute regarding such testimony was on the use of the word *kula.* G&R claimed that when the kamaainas referred to a land as "kula", dry land, they meant that the land was never devoted to taro culture in ancient times, hence the land had no appurtenant water rights. The State and McBryde, on the other hand, claimed that by "kula" the kamaainas meant that the land was not in taro cultivation at the time they first were familiar with the land. This Court sustains the contention made by McBryde and the State that the term "kula" was used by the kamaainas to mean "uncultivated".

(5). *Government Registered Maps.* Government registered maps put in evidence by the State as Exhibits 32(a) to (f) inclusive, which are the same as McBryde Exhibits 1 to 6 inclusive, and the compilation of these 6 maps put in evidence as McBryde Exhibit M-C-7, show the various ancient *auwais* and by broken lines or dash lines show *kuaunas* or taro patch banks.

(6). *Historical Data.* Writings of Captain Vancouver, Hiram Bingham and other early explorers and writers of early Hawaiian history, including correspondence found in the State Archives, generally show that the Hanapepe Valley area was a fertile valley of taro patches.

(7). *Other Method of Proof of Ancient Taro Lands.*

(a) Dr. E. S. Craighill Handy, eminent authority on Hawaiian anthropology and ethnology, testified for McBryde to the effect that Hanapepe was one of the finest areas for taro cultivation that he observed; that *before depopulation* became serious in Hawaii, there was no land to which they could get water for irrigation which was neglected by the Hawaiians. He also testified regarding the ingenuity and skill of the Hawaiians in building irrigation systems. (Emphasis supplied.)

(b) Dr. Kenneth Emory, staff anthropologist at the Bishop Museum since 1920, likewise testified regarding the skill and ingenuity of the early Hawaiians to bring water from distant places to grow taro. Relative to Hanapepe Valley, he stated that every bit of available land *at the time of maximum population* was under cultivation, with all of the ingenuity the Hawaiians had in bringing land into maximum best productivities through their skills in irrigation and so forth. (Emphasis supplied.)

The theory that all land which could have been irrigated was cultivated in wet land taro is not necessarily established by the evidence. As pointed out by both Dr. Handy and Dr. Emory, the above statement is correct if confined to the time of maximum population or before depopulation set in in all of the islands including Kauai. There had been a tremendous decrease in population throughout the Hawaiian Islands, including Kauai and Hanapepe, at about the time of the Mahele.

After reviewing the various authorities and evidence herein in the matter of ancient Hawaiian taro culture, this Court feels that the area of taro land lying fallow would equal at least one-half of that in actual cultivation, which means that out of all wet taro lands under cultivation about the time of the Mahele, at least one-third of such land would lie fallow at all times.

At about the time of the Mahele, the Hawaiians had no use for taro except to eat it. Theirs was a subsistence agriculture, and any theory that the need for taro was so great that all irrigable land was used for taro cultivation in 1851-1855, or about the time of the Mahele, is not supported by the evidence. Only such irrigable land as there was need for was used for taro cultivation.

*Taro Water Duty*

62. [As amended R7-269] The parties on both sides have submitted into evidence reports of certain experiments as bases for expert opinions. McBryde relies principally on the scientific experiment reported in McBryde's Exh. M-K-59 and supplemental reports, and accordingly, its chief witnesses, Joel B. Cox and Keith Tester, based their opinion testimonies on such experiment and reports.

G&R rely on two reports, namely, the preliminary report of H. A. R. Austin & Associates, Ltd., (Exh. G&R-G-1), and report of George Robert Ewart, Jr. (Exh. G&R-H-12a).

G&R's Exh. G&R-G-1 is considered to be merely a preliminary report. Thus, Mr. Russell Smith, who testified for G&R, was unable to express any opinion based on that report alone. He has taken the position that, although he admittedly has no personal and direct knowledge as to how each of the other reported experiments was conducted, he is basing his opinions on all the reports submitted in this case.

A cursory examination of the report and testimonies will show that different approaches and methods are reflected in the different experiments. Thus, the Court, in attaching appropriate weight to the several opinion testimonies, has considered (a) whether, and to what extent, each experiment has attempted and succeeded in its attempt to simulate the ancient Hawaiian practice of taro cultivation. and (b) to what extent each experiment affords accurate data on which opinion testimony of water duty may be based.

Ewart's report and Austin & Associates' experiment show no attempt made on behalf of G&R to simulate ancient Hawaiian taro cultivation.

There was a general agreement between Mr. Joel B. Cox and Mr. Russell Smith relative to Hanapepe Valley as containing three broad areas, namely, mauka, middle and makai, representing three rather separate geological conditions, and that the middle area can be expected to be much more porous than the other two areas.

There is a pattern to the enormous variation in water consumption, which together with the indications derived from moisture equivalent readings and observations of field conditions, provides the best basis for determining a reasonable estimation of water duty for Hanapepe Valley. The moisture equivalent method is an indication of permeability. It was precisely this basis that was employed by the State and McBryde experimenters.

Although Mr. Joel B. Cox admitted that a complete simulation of the ancient Hawaiian practice was impossible or utterly impracticable, extensive efforts were made by the State-McBryde experimenters to achieve as close a simulation of ancient conditions as possible. Very careful thought and consideration was given by such experimenters to the way their attempted simulation necessarily differed from the ancient Hawaiian practice. They took pains to choose methods which would tend to reduce consumption rather than increase it when confronted with the necessity to divert from the ancient practice, and the taro crops in 1930 were cultivated after all possible efforts were taken to simulate ancient Hawaiian taro cultivation within the realm of practicability.

It goes without saying that the ideal method of determining the average consumption of water throughout Hanapepe Valley would have been to actually measure the consumption of every parcel but that would have been impracticable and too costly.

The experiment conducted on behalf of the State and McBryde represents an honest and tedious effort to understand and simulate the practice of ancient taro cultivation, at least to attain the result with the best scientific approach although not identical in every particular. The extent of the effort of the experimenters can be found in the extensive and detailed data recorded and compiled. Great effort of scholarship and research was expended even before the State-McBryde's experiment was started. Every effort was made by the State and McBryde experimenters to learn about and simulate the ancient Hawaiian conditions, but the resources available to them made it impossible to reproduce identical conditions.

The joint experiment conducted by the then Territory and McBryde in 1930-31 of the entire period of growth over a crop of taro using continuous recorders, large numbers of samples and frequent observations, have been sufficiently demonstrated to be of a quality superior to the tests made by G&R.

Mr. Joel B. Cox testified that he would consider the 70 thousand gallons per acre per day figure arrived at by the experimenters to be a conservative lower limit of rate of consumption under ancient Hawaiian conditions, and further that 80,000 gallons per acre per day would fall within that zone of reasonable interpretation.

63. The Court finds that the duty of water (quantity of water customarily used and necessary to grow an average crop of taro) in Hanapepe Valley at or immediately prior to the award or grant is as follows:

| | |
|---|---|
| Average consumption (gross) | 80,000 gpapd |
| Plus allowance for circulation | 3,000 gpapd |
| | 83,000 |
| Plus 15% for ditch losses | 12,450 |
| | 95,450 |
| Less 21.4% for kuaunas | 20,400 (rounded) |
| | 75,050 |
| Less ⅓ for fallowing | 25,000 (rounded) |
| Average consumption (net) | 50,050 gpapd |

N.B. "gpapd" means "gallons per acre per day."

63A. [As amended R7-249] There is not sufficient evidence to show the duty of water in the valleys of Manuahi and Koula.

64. [As amended R7-249-250] By reason of their ownership of lands in Hanapepe Valley having appurtenant water rights, the parties are entitled to appurtenant water rights as follows:

| | |
|---|---|
| McBryde: | 50,050 gpapd |
| | × 98.21 (acres) |
| | 4,915,400 gpd (rounded) |
| The State: | 50,050 gpapd |
| | × 83.27 (acres) |
| | 4,167,650 gpd (rounded) |
| Other Land Owners: | 50,050 gpapd |
| | × 29.11 (acres) |
| | 1,456,950 gpd (rounded) |
| G&R<br>(below Koula & Manuahi) | 50,050 gpapd |
| | × 30.63 (acres) |
| | 1,533,050 gpd (rounded) |

G&R is also entitled to appurtenant water rights for 90 acres of land in Koula and Manuahi, the quantity of which can not be determined in the absence of evidence as to the duty of water.

*Rice Lands*

65. McBryde claims prescriptive water rights for certain lands cultivated in rice for more than the statutory period. These claims are:

| | | |
|---|---|---|
| McBryde Item 13 D | Part of Kuiloa (island) | 1.98 acres |
| McBryde Item 13 E | Part of Kuiloa (island) | 0.86 acre |
| McBryde Item 13 F | Part of Kuiloa (island) | 3.58 acres |
| McBryde Item 21 S | Part of Eleele | 18.15 acres |
| McBryde Item 14 | Part of LCA 3284:4 | 0.12 acres |

McBryde's evidence on rice cultivation on these lands at best was vague, sporadic and inconclusive and fails to establish use of water which was open, notorious, hostile and adverse for any continuous uninterrupted period of 10 years.

There are no records in evidence showing the amount of water diverted for rice cultivation on these parcels of rice land, nor are there records of McBryde's diversions during the period of rice cultivation.

The area claimed by McBryde to have been cultivated in rice in the ili of Kuiloa, 6.42 acres, was less than the area having appurtenant water rights in Kuiloa. The area claimed by McBryde to have been cultivated in rice in the ili of Eleele, 18.15 acres, was less than the area having appurtenant water rights in Eleele. The area cultivated claimed to have been in rice in LCA 3284:4 was less than the area having appurtenant water rights in LCA 3284:4. It follows that since these areas had appurtenant water rights, if in fact McBryde permitted them to be used in rice cultivation that use was not adverse but was in fact a lawful use of ancient appurtenant water rights.

## COURT'S EXHIBIT "1"

### OWNERSHIP OF LANDS

*Owned by McBryde*

| | | Title | Tax Key |
|---|---|---|---|
| *LCAw. | 3284 | por. Ap. 1 Wahineaea | 1-9-03-por. 25 |
| | 3284 | Ap. 3 " | 2-1-01-por. 10 |
| | 3284 | Ap. 4 " | 1-9-03-5 |
| | 7321-B | Ap. 1 Kualeho | 1-9-02-39 & por. 15 |
| | 7631 | por. Ap. 1 Kelemoku | 1-9-12-por. 24 |
| | 7922 | Kapaohea | 1-09-02-21 & 22 |
| | 8036 | Aihoi | 2-1-01-por. 10 |
| | 8182 | Heau | 1-9-12-por. 24 |
| | 8198 | Kamano | 2-1-01-por. 10 |
| | 8254 | Ap. 1 Haoleki | 1-9-12-por. 24 |
| ** | 8254 | por. Ap. 2 " | 1-9-12-7 & 8 |
| | 9029 | Kaohulihau | 1-8-05-11 |
| * | 9232 | Ap. 1 Kaaaaolea | por. 1-9-04-23 &<br>1-9-12-45 & 49 |

*EXHIBIT 1*
Page 1

|  |  |  | *Title* | *Tax Key* |  |
|---|---|---|---|---|---|
| *LCAw. | 10016 |  | por. Ap. 2 Lono | 1-9-12-46 & 48 |  |
|  | 10271 |  | por. Ap. 1 Makailio | 1-8-05-14 |  |
|  | 10922 |  | Ula | 1-9-02-16 & por. 15 |  |
|  | 11011 |  | Ap. 1 Palama | 2-1-01-por. 10 |  |
|  | Kam IV |  | Ap. 2 Aihoi | 1-9-01-5 |  |
|  | ( 5309 | Und. Int. | Kanakamaikai | 1-8-03-8 | ) |
|  | ( 5447 | Und. Int. | # Ap. 1 Nuanua | 1-8-03-6 | ) |
|  | ( 5447 | Und. Int. | Ap. 3 " | 1-8-03-12 | ) |
|  | ( 7928 |  | Ap. 1 Maluaikoo | 1-8-03-por. 3 | ) |
| ** | ( 7928 |  | Ap. 2 " | 1-8-03-por. 3 | ) |
|  | ( 9135 | Und. Int. | Ap 1 Kalepona | 1-8-03-15 | ) |
|  | ( 10010 |  | Makahiki | 1-8-03-por 3 | ) |
|  | ( 10526 |  | Naloheelua | 1-8-04-por. 8 | ) |
|  | ( M. Aw. 19-B |  | Kanehiwa | 1-8-04-por. 8 | ) |
| *Ili of Kuiloa LCAw. 5572-B |  |  | Ap. 3 Kaaha | Various |  |
| *Ili of Eleele LCAw. 7712 |  |  | Ap. 5 Kekuanaoa | Various |  |

*Portion water rights only
**Water rights only

*EXHIBIT 1*
Page 2

*N.B.* # "Nuanoa" corrected to read "Nuanua".

## *Owned by G&R*

| | | | *Title* | *Tax Key* |
|---|---|---|---|---|
| LCAw. | 3284 | | Ap. 2 Wahineaea | 1-9-01-12 & 13 |
| | 5309 | Und. Int. | Kanakamaikai | 1-8-03-por. 8 |
| | 5447 | Und. Int. | Ap. 1 Nuanua | 1-8-03-6 |
| | 5447 | | Ap. 2 " | 1-8-03-por. 8 |
| | 5447 | Und. Int. | Ap. 3 " | 1-8-03-12 |
| | 6578 | | Ap. 2 Paele | 1-9-08-por. 8 |
| | 7919 | | Kaiahauna | 1-9-02-5 |
| | 7993 | | Ap. 1 Pala | 1-9-02-17 & 18 |
| | 8020 | | por. Ap. 1 Asa Kapoi | 1-9-12-por. 12 |
| | 8020 | | Ap. 2 " " | 1-9-02-10 |
| | 8077 | Und. Int. | Ap. 2 Hii | 1-9-01-4 |
| | 8077 | | Ap. 3 " | 1-9-01-por. 6 |
| | 8128 | | Holeka | 1-9-12-3 |
| | 9135 | Und. Int. | Ap. 1 Kalepona | 1-8-03-15 |
| | 9142 | | por. Ap. 1 Kapekue | 1-9-12-40 |

*EXHIBIT 1*
Page 3

| | *Title* | *Tax Key* |
|---|---|---|
| *LCAw. 9190 | por. Ap. 1 Kupia | 1-9-02-8, 9 & 43<br>1-9-12-1 & 30 |
| 9265 | Kipani | 1-8-04-2 |
| 9283 | Ap. 2 Keliinui | 1-9-12-27 |
| 10069 | Maluihi | 1-9-03-por. 8 |
| 10274 | Palahe | 1-8-04-9 |
| 10275 | Makaino | 1-8-03-por. 8 |
| 10312 | Ap. 1 Namaielua | 1-9-12-por. 12 |
| 10349 | Nakapa | 1-8-03-23 |
| 10678 | Ap. 1 Pua | 1-8-03-14 |
| 11011-B | Makaiku | 1-9-01-por. 6 |
| 11068 | Wailele | 1-8-04-7 |

*Portion water rights only

*Owned by State of Hawaii*

|  | *Title* |
|---|---|
| LCAw. 9116 | por. Ap. 1 Koolau |

Government lots 1 through 55 and remnants**

**Water rights only as to lots 6B and 54B

*EXHIBIT 1*
Page 5

*Owned by Others*

| | | *Title* | *Tax Key* | *Owners* |
|---|---|---|---|---|
| *LCAw. | 3284 | por. Ap. 1 Wahineaea | 1-9-03-11, 23, 26 | Wilfred K. Dung & Lily A. Kamaki |
| | 3654 | por. Ap. 2 Kamae | 1-9-03-12 | County of Kauai |
| | 3654 | por. Ap. 2 " | -28 | Ann N. Kali |
| | 3654 | por. Ap. 2 " | -29 | Robert K. Kali |
| | 5447 | por. Ap. 2 Nuanua | 1-8-03-por. 29 | Ida K. Horner |
| | 7321-B | Ap. 2 Kualeho | 1-9-01-18 & 19 | Albert K. Kaailau & Hideo Nonaka |
| | 7631 | por. Ap. 1 Kelemoku | 1-9-12-9 | Toshio Komaki, Lily A. Komaki & Wilfred K. Dung |
| | 7677 | Ap. 1 Kamalana | 1-9-12-por. 20 | Kiichi Shimomura |
| | 7920 | Kikoi | 1-9-02-26 & 27 | Kiyoshi Kimata |
| | 7923 | Kekeko | 1-8-03-07 | Ida K. Horner |
| | 7925 | Keawe | 2-1-01-8 | William H. Makanui, Jr. & Heirs of J. R. Kaeulii |
| | 8011 | Alihi | 1-8-05-05 | George Makanui, May M. Corr, Shirley M. Mokunui, Morris Mokunui, Abraham Mokunui, George Mokunui & Heirs of Louisa Mokunui |
| | 8020 | por. Ap. 1 Aaa Kapoi | 1-9-12-22 | Hideo Nonaka & Albert K. Kaailau |

*EXHIBIT 1*
Page 6

|  |  | *Title* | *Tax Key* | *Owners* |
|---|---|---|---|---|
| LCAw. 8020 |  | por. Ap. 1 Aaa Kapoi | 1-9-12-23 | Takano Nonaka, Kazuo Nonaka, Takao Nonaka, Hideo Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigeichi Nonaka & Hirami Nonaka |
| 8020 |  | por. Ap. 1 " " | 1-9-12-51 | County of Kauai |
| 8077 |  | Ap. 1 Hii | 1-9-02-11 | Junichi Kano & Harriet U. Kano |
| 8077 | Und. Int. | Ap. 2 " | 1-9-01-4 | Leileihua Durg |
| 8215 |  | # Ap. 1 Iese | 1-9-12-4 | Henry J. Chu & Helen B. H. Chu |
| 8254 |  | por. Ap. 2 Haoleki | 1-9-12-32 | Heirs of Rachel K. Kaohi |
| 9116 |  | por. Ap. 1 Koolau | 1-9-12-por. 10 | Elizabeth Y. Chang |
| 9142 |  | por. Ap. 1 Kapekue | 1-9-12-19 | Fannie K. Peters et al. |
| 9189 |  | por. Ap. 1 Keawe | 1-9-12-55 & Por. 16 | Kuulei Wong |
| 9189 |  | por. Ap. 1 " | 1-9-12-54 | County of Kauai |
| 9190 |  | por. Ap. 1 Kupia | 1-9-12-29 | Chee Kung Fui Society |
| 9190 |  | por. Ap. 1 " | 1-9-02-47 | County of Kauai |
| 9232 |  | ## por. Ap. 2 Kaaaaoloa | 1-9-12-26 | Henry J. Chu & Helen B. H. Chu |
| 9232 |  | por. Ap. 2 " | 1-9-12-por. 38 | Bart Dai Sin Mew Church |
| 9272 |  | por. Kaipehu | 1-9-12-14 & 53 | Tai Hing Leong, Trustee<br>Albert K. Kaailau & Hideo Nonaka |
| 9272 |  | por. " | 1-9-12-52 | County of Kauai |

*EXHIBIT 1*
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*N.B.* # "Lese" corrected to read "Iese".
## "Kaaaoloa" corrected to read "Kaaaaoloa".

| | *Title* | | | *Tax Key* | *Owners* |
|---|---|---|---|---|---|
| LCAw. 10017 | por. | | Lauki | 1-9-12-25 & 42 | Tai Hing Leong & Lo Sun D. Leong |
| 10017 | por. | | " | -43 | Marcellino Francisco &<br>Lapas Francisco |
| 10271 | por. | Ap. 1 | Makailio | 1-8-05-13 | Kauanui Kaluna & James W. Smith |
| 10271 | | Ap. 2 | " | 1-8-05-4 | William H. Makanui, Jr.<br>Julie L. Makanui, Betty P. Makanui,<br>Joseph K. Makanui, & Bernard H. Makanui |
| 10271 | | Ap. 3 | " | 1-8-05-6 | William H. Makanui, Jr.<br>Julia L. Makanui, Betty P. Makanui,<br>Joseph K. Makanui & Bernard H. Makanui |
| 10275 | por. | | Makaino | 1-8-03-por. 29 | Ida K. Horner |
| 10311 | | Ap. 3 | Kamoku | 1-9-12-por. 16 | Kuulei Wong |
| 10595 | por. | Ap. 1 | Paukala | 1-9-11-13 | Hideo Nonaka & Albert K. Kaailau |
| 10595 | por. | Ap. 1 | " | 1-9-11-20 | County of Kauai |
| 10595 | | Ap. 2 | " | 1-9-12-21 | Hideo Nonaka & Albert K. Kaailau |
| R. P. 4504 | por. | | Sigalas | 1-9-01-17 | Takano Nonaka, Kazuo Nonaka,<br>Takao Nonaka, Masatoshi Nonaka,<br>Iwao Nonaka, Shigekichi Nonaka &<br>Hiromi Nonaka |
| Gr. 7663 | | | Nanakaole | 1-9-02-25 | Claude M. Kapukui |
| Gr. 7686 | por. | | Rose Ah Pa | 1-9-02-23 | Henry J. Chu |
| Gr. 7686 | por. | | " | 26 | Wallace A. Naumu & Hinayo T. Naumu |

*Portion water rights only owned by others.

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## EXHIBIT E

*Taro Land of Other Private Owners*

| *Title L. C. Aws.* | | *Tax Key* | *Taro Land Area* | *Owner* |
|---|---|---|---|---|
| 3284 | Portion Ap. 1 Wahineaea | 1908-11 | 1.00 | Wilfred A. Dung & Lily A. Kamaki |
| 3554 | Ap. 2 Kamae | 1908-12, 28, 29 | 1.47 | Robert K. Kali & Ann K. Kali<br>County of Kauai |
| 5447 | Portion Ap. 2 Nuanua | 1808-Por. 29 | 1.45 | Ida K. Horner |
| 7821-B | Ap. 2 Kualeho | 1901-18 & 19 | 0.65 | Albert K. Kaailau & Hideo Nonaka |
| 7681 | Portion Ap. 1 Kalemoku | 1912-9 | 0.59 | Toshio Komaki, Lilly A. Komaki & Wilfred A. Dung |
| 7677 | Ap. 1 Kamalama | 1912-Por. 20 | 0.70 | Kiichi Shimomura |
| 7920 | Kikoi | 1902-26 & 27 | 1.10 | Kiyoshi Kimato |
| 7923 | Kekeko | 1808-7 | 0.80 | Ida K. Horner |
| 7925 | Keawe | 2101-8 | 0.90 | Unknown heirs of J. R. Kaalii, Violet A. K. Makanui, Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui, Bernard H. Makanui & William H. Makanui, Jr. |
| 8011 | Alihi | 1806-5 | 1.00 | George Mokanui, unknown heirs of Louisa Mokanui, May M. Corr, Shirley M. Mokunui, Morris Mokunui, Abraham Mokunui & George Mokunui |
| 8030 | Portion Ap. 1 Aaa Kapoi | 1912-22 & 23 | 1.03 | Hideo Nonaka, Albert K. Kaailau, Takano Nonaka, Kazuo Nonaka, Takao Nonaka, Hideo Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigekichi Nonaka & Hiremu Nonaka |
| 8030 | Portion Ap. 1 | 1912-51 | 0.27 | County of Kauai |

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| *Title* <br> *L. C. Aws.* | | | *Tax Key* | *Taro* <br> *Land Area* | *Owner* |
|---|---|---|---|---|---|
| 8077 | | Ap. 1 Hii | 1902-11 | 0.60 | Junichi Kano & Harriet U. Kano |
| 8077 | Und. Int. | Ap. 1 Hii | 1901-4 | 0.27 | Leilehua Dung |
| 8215 | | Ap. 1 Iese | 1912-4 | 0.52 | Henry J. Chu & Helen B. H. Chu |
| 8254 | Portion | Ap. 2 Haoleki | 1912-32 | 0.14 | Unknown heirs of Rachel K. Kaohi |
| 9116 | | Ap. 1 Koolau | 1912-Por. 10 | 2.35 | Elizabeth Y. Chang |
| 9142 | | Ap. 1 Kapekue | 1912-19 | 0.43 | Fannie K. Peters |
| 9189 | | Ap. 1 Keawe | 1912-Por. 16 & 55 | 1.0 | Kuulei Wong |
| 9189 | | Ap. 1 Keawe | 1912-Por. 54 | 0.29 | County of Kauai |
| 9190 | Portion | Ap. 1 Kupia | 1912-29 | 0.86 | Chee Kung Fui Society |
| 9190 | Portion | Ap. 1 Kupia | 1902-47 | 0.03 | County of Kauai |
| 9232 | Portion | Ap. 2 Kaaaaoloa | 1912-26 & Por. 38 | 1.08 | Bart Dai Sin Mew Church, Tai Hing Leong - Trustee, Henry J. Chu & Helen B. H. Chu |
| 9272 | | Kaipehu | 1912-14 & 53 | 0.22 | Albert K. Kaailau & Hideo Nonaka |
| 9272 | | Kaipehu | 1912-52 | 0.22 | County of Kauai |
| 10017 | | # Lauki | 1912-25, 42 & 43 | 0.95 | Tai Hing Leong, Lo Sun Dang Leong, Marcellino Francisco & Lapaz Francisco |
| 10271 | Portion | Ap. 1 Makailio | 1805-13 | 0.25 | Kauanui Kaluna & James W. Smith |
| 10271 | | Ap. 2 Makailio | 1805-4 | 0.60 | Violet A. K. Makanui, William H. Makanui, Jr., Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui, & Bernard H. Makanui |

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EXHIBIT E
Page 3

| *Title*<br>*L. C. Aws.* | | | *Tax Key* | *Taro*<br>*Land Area* | *Owner* |
|---|---|---|---|---|---|
| 10271 | | Ap. 3 Makailio | 1805-6 | 0.25 | Violet A. K. Makanui, William H. Makanui, Jr., Julia L. Makanui, Betty P. Makanui, Joseph K. Makanui, & Bernard H. Makanui |
| 10275 | Portion | Makaino | 1808-Por. 29 | 0.99 | Ida K. Horner |
| 10311 | | Ap. 2 Kamoku | 1912-Por. 16 | 0.54 | Kuulei Wong |
| 10595 | | Ap. 1 Puakala | 1911-18 | 0.83 | Hideo Nonaka & Albert K. Kaailau |
| 10595 | | Ap. 1 Puakala | 1911-20 | 0.25 | County of Kauai |
| 10595 | | Ap. 2 Puakala | 1912-21 | 1.28 | Hideo Nonaka & Albert K. Kaailau |
| R. P. 4504 | Portion | | 1901-17 | 4.20 | Takano Nonaka - L/1 Kazuo Nonaka Takeo Nonaka, Hideo Nonaka, Masatoshi Nonaka, Iwao Nonaka, Shigekichi Nonaka & Hiromi Nonaka |
| Gr. 7668 (Lot 54-A) | | Nanakaole | 1902-25 | 0.12 | Claude M. Kapukui |
| Gr. 7686 | | Rose Ah Pa | 1902-23 & 38 | 0.30 | Henry J. Chu, Wallace A. Naumu, & Hinayo T. Naumu |
| | | | TOTAL | 29.11 | |

## *Conclusions of Law*

### *Burden of Proof*

The burden of proof is upon McBryde to establish the allegations of its complaint, specifically the areas it must prove by credible evidence what lands it has which are entitled to appurtenant water rights and the consumption of water of such lands. It has the burden of establishing by competent evidence each and every element of its adverse possession, prescription or adverse use claims; that its takings of water (over and above its appurtenant water rights) were actual, open, notorious, continous, hostile, exclusive and adverse to the true owner. Adverse use is to be taken strictly and every presumption is in favor of a use in subordination to the rightful owner. *Territory v. Pai-a,* 34 Haw. 722; *Lalakea v. Haw'n. Irrig. Co.,* 36 Haw. 692; *Tagami v. Meyer,* 41 Haw. 484.

### *Appurtenant Water Rights*

1. When land was awarded by the Land Commission or granted by the King or government, the award or grant included the right to water in the quantity which was customarily used on the land at and immediately before the date of the award or grant.

*Carter v. Territory,* 24 Haw. 47, at page 64:

> ". . . Like the rights which passed to lands awarded by the land commission, it was a right to such quantity of water as was customarily used on the land at and immediately before the

> date of the grant so long as that quantity continued to be available. . . ."

See also: *Territory v. Gay,* 31 Haw. 376, at page 83:

> ". . . Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, the land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named. . . ."

Hutchins, ***The Hawaiian System of Water Rights,*** pp. 104-106.

2. Earlier cases holding that the awards carried with them a right to the water which the lands used by "immemorial custom" are consistent with *Carter v. Territory* and *Territory v. Gay,* supra. An immemorial custom at the time of the Land Commission would be one which had then existed for as long as anyone could remember.

*Black's Law Dictionary,* 4th ed., p. 884, "immemorial usage":

> "A practice which has existed time out of mind."

Accord: 20 *Words and Phrases* 211 "immemorial use":

> "'Immemorial use is a use time out of mind, or from a time whereof the memory of man is not to the contrary.'"

3. One of the reported cases using the word "immemorial" is *Peck v. Bailey,* 8 Haw. 658 (before Allen, C. J., sitting alone 1867):

> "There can be no difference of opinion that the complainants were entitled to all the water rights which the lands had by prescription at the date of their title. By the deed, the water courses were conveyed and a right to the water accustomed to flow in them. The same principle applies to all the lands conveyed by the King, or awarded by the Land Commission. If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance. . . . (p. 661)
>
> ". . . Each grantee will hold all that has been conveyed to him, unless it should conflict with a previous conveyance. This includes the water courses on their lands, and all the water which the lands had enjoyed from time immemorial. . . ." (p. 662)

Two other cases *Davis v. Afong,* 5 Haw. 216, 224, and *Mele v. Ahuna,* 6 Haw. 346, 349, refer to water which had been used "from ancient times." Such references to the use of water which had persisted *from* time immemorial or ancient times are in no way in conflict with the holding of *Carter v. Territory* and *Territory v. Gay,* supra, that the use must persist *until* "at and immediately before" the Land Commission award if it is to be transformed into a vested right by that award. Prior to the Mahele the King was the owner of all the land and all water rights. The title vested in private ownership upon the issuance of the award or grant and not before. (Emphasis supplied.)

This Court holds that when our Supreme Court uses the expression "from time immemorial", it means the condition of the land and its continuous use as long as anyone can remember up to the date of the award. It does not mean some use that may have existed in the days of the first discovery which did not continue right up to the date of the determination by the land commission.

4. The traditional method of describing the quantity of water rights, and of decreeing their apportionment has been in terms describing the dams, ditches and time schedule of diversion: *Wilfong v. Bailey,* 3 Haw. 479; *Wong Kim v. Kioula,* 4 Haw. 504; *Loo Chit Sam v. Wong Kim,* 5 Haw. 130; *Mele v. Ahuna,* supra; *Peck v. Bailey,* supra; *Lonoaea v. Wailuku Sugar Co.,* 9 Haw. 651; *Chun Lai v. Mang Young,* 10 Haw. 133; *Horner v. Kumuliilii,* 10 Haw. 174; *See Yick Wai Co. v. Ah Soong,* 13 Haw. 378.

Apportionment by time schedule is expressly authorized by the statute governing water commissions. R.L. 1955, §234-33. However, there is precedent for a decree framed in terms of gallons per day. *Hilo Boarding School v. Territory,* 23 Haw. 595.

5. [As amended R7-248] Each of the parties having appurtenant water rights shall receive a continuous flow of water equal to the acreage of taro land found above (Findings Nos. 56 through 61, as amended) times the typical duty of water found above of 50,050 gallons per acre per day (Findings Nos. 63 and 64).

The above conclusion, however, does not apply to the lands of G&R in Koula and Manuahi, which the Court has found includes 90 acres entitled to water rights, without satisfactory evidence of their duty of water. (Findings 63A and 64). This leaves undecided the quantity of water to which said 90 acres may be entitled.

### *Surplus Water Rights*

6. The normal surplus waters rising and flowing from Koula and Manuahi streams belong to G&R. *Territory v. Gay,* supra, affirmed 52 F. 2d 356, cert. denied 284 U. S. 677.

7. Surplus waters are those of a stream in excess of the quantities required to satisfy established rights including ancient appurtenant rights, prescriptive rights, and rights conveyed by deed. *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.,* 15 Haw. 675; Hutchins, *The Hawaiian System of Water Rights,* 70-74.

8. The division of surplus water into "normal surplus" and "storm or freshet" surplus originated in *Carter v. Territory,* supra, at page 70, in which it was decided that "storm or freshet" waters of a stream which flows through two or more *ahupuaas* must be apportioned between them according to riparian law.

9. Some language in *Carter v. Territory,* supra, applied literally to all surplus water, although the Supreme Court was only dealing with storm surplus. (There was no surplus in that stream except in times of storm or freshet.) In *Territory v. Gay,* supra, the

court held that the normal surplus of a stream belonged to the konohiki of the land on which it arose.

10. The trial court in *Territory v. Gay,* 1st Cir. Eq. 2911, affirmed 31 Haw. 376, had found that the ownership of the storm or freshet surplus was moot, since none of its was being diverted by G&R. On appeal, a majority of the Supreme Court (Perry, C. J. and Parsons, J.), held that normal surplus belonged to G&R. However, no decision was reached as to storm or freshet waters. Perry, C. J. would have overruled *Carter v. Territory,* supra, and awarded all surplus water, both normal and storm or freshet, to G&R. Parsons, J. took the view that the correctness of *Carter v. Territory,* supra, should not be reviewed until the issue was squarely presented. Banks, J. would have adopted riparian law in place of our traditional water law.

11. None of these decisions define "normal", "storm", or "freshet" surplus. The one thing that is clear is that these terms are meant to be complementary; "normal" surplus leaves off where "storm or freshet" surplus begins.

12. In neither *Carter v. Territory* nor *Territory v. Gay,* supra, did the Supreme Court compute the dividing line between "normal" and "storm or freshet" surplus, nor indicate how it is to be done.

13. It is uncertain whether the rule of *Carter v. Territory,* supra, is still the law of Hawaii. *Territory v. Gay,* supra, invites reconsideration of the rule but only if the facts require it. In this case, the water measurements are such that the Court finds

that both normal surplus as well as storm and freshet surplus waters are involved, and this Court must determine who are entitled to them.

Perry, C. J. in *Territory v. Gay,* supra, at pages 393-403, reviewed the objections to applying the law of riparian rights to "storm or freshet surplus" accurately and at length. They are concurred in by Hutchins, *The Hawaiian System of Water Rights,* pp. 94-98. This Court holds that all the surplus waters of Koula and Manuahi streams, without distinction between "normal" and "storm or freshet" surplus, belong to G&R on whose land they rise.

It is unnecessary to repeat the cogent reasons of Perry, C. J. and Hutchins, except to point out that they are substantiated with particular force here:

(a) The Chief Justice's prediction that it would be difficult to determine "what precise line is to be drawn in practice between the higher normal flows and the smaller freshets" (Perry, C. J., 31 Haw. 392) is demonstrated by the evidence in this case;

(b) Under the rule as expressed in *Carter v. Territory,* supra, at page 70, the "storm or freshet surplus" must be used on the ahupuaas or ilis kupono through which the stream passes. This is because of the riparian rule which limits the use of water to lands on the "ripa" or bank of the river. *Territory v. Gay,* supra, at pages 396-7. These riparian lands already have ample water rights sufficient for sugar cultivation, and the important economic use for the storm and freshet waters is for the irrigation of dry kula lands outside the Hanapepe Valley. Much of the so-called riparian lands already has appurtenant water rights as herein determined by the Court.

(c) Riparian rights vary from time to time, Hutchins, *The Hawaiian System of Water Rights* 97, according to many factors, including the use which other riparian owners may wish to make of the water. Irrigation systems of the sugar plantations involved in this case show that large capital investments are necessary for the use of this water. The upkeep and expansion of these systems will be discouraged if those who make the investments know that their rights to the water may be changed whenever other riparian owners develop a new potential use for the water. The policy of the statute creating water commissions is to determine water rights so that they may be relied on by their owners. This objective would be defeated if water rights are subject to periodic revision.

*rescriptive Rights*

14. The above conclusions as to the quantity of appurtenant and surplus water rights describes those rights as created by the Land Commission awards. It remains to be considered whether they have been altered by adverse use or prescription.

*Elements of Prescription.* In order to establish a prescriptive title to a water right, there must have been an "actual, open, notorious, continuous and hostile use" of the water against the rightful holder for the period prescribed by the statute of limitations, to wit, Sec. 241-30, R. L. H. 1955. *Territory v. Gay*, supra, at p. 383. The use must also have been under a claim of right. *Davis v. Afong,* supra, at page 221; *Wong Leong v. Irwin,* 10 Haw. 265, 271; *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.,* 20 Haw. 658, 666.

*Continuity of Use.* The general principle is that use of the water shall have been continuous during the statutory period. This necessarily does not mean that the water must have been taken and used incessantly; the use is adverse if water is taken whenever required for the purpose for which the right is claimed, and this need not be done at regular periods. *Davis v. Afong,* supra, at page 221.

The continuity of use necessary to support a prescriptive title is interrupted if the rightful owner diverts the water for his own use during a fraction of the prescriptive period and thus prevents the use by the adverse claimant at a time when needed. *Kohala Sugar Co. v. Wight,* 11 Haw. 644, at 649-654.

A use of water made without resistance during the times when the supply was adequate for all claimants, but forcibly and successfully resisted when the water supply was short, could not be the basis of an adverse right, for no one was injured by the use which was actually made during the time of ample water supply. *See Yick Wai Co. v. Ah Soong,* supra, at page 382; *Palolo Land & Improvement Co. v. Wong Quai,* 15 Haw. 554, 560, 562.

The general principle that the statute of limitations does not run against the government, such as the State of Hawaii, has been recognized in Hawaii, as elsewhere.

*Adverse Use or Prescriptive Claims of McBryde*

15. During the years 1934-1949, McBryde diverted 7 million gallons per day or more from the river for a period of more than 10 years.

16. The days during this period on which McBryde's recorded takings were less than 7 million gallons per day were so few, and generally explicable by the absence of need or the failure of pumps or measuring devices, that they do not amount to discontinuance of diversion.

17. Attempts by McBryde to take more than 7 million gallons per day were interrupted by HS Co.'s and later G&R's diversions of so much water that McBryde was unable to take more than 7 million gallons per day. These interruptions each lasted several days, and make at least three interruptions in any 10-year period, as shown in finding "55" herein. The Court thus concludes that McBryde's diversions of water from the Hanapepe River were actual and continuous only up to 7 million gallons per day.

18. As shown in finding "64" herein, by reason of their ownership of lands having appurtenant water rights, the parties are entitled to total appurtenant water rights as follows:

| | |
|---|---|
| **McBryde** | **4,915,400 gpd (rounded)** |
| **The State** | **4,167,650 gpd (rounded)** |
| **Other Land Owners** | **1,456,950 gpd (rounded)** |
| **G&R (below Manuahi & Koula)** | **1,533,050 gpd (rounded)** |
| **G&R (Manuahi & Koula)** | **Unknown** |

McBryde during these periods took as much water as there was in the river. The County of Kauai, a political subdivision of the State, took 225,000 gpd (Finding No. 33), leaving 4,167,950—225,000=3,942,650 which was either wholly or partially taken by McBryde. McBryde can acquire no right to this water against the State, since prescription does not run against the sovereign, or against anyone else, since the water was the State's.

19. There is no evidence about the diversions of the "others" during this period, although since McBryde was diverting as much water as passed the USGS station at the junction of Koula and Manuahi, it is unlikely that the "others" were taking any.

20. The original lease to Watson, assigned six days later to HS Co., gave the lessee the right to take "all" the waters of Koula, but did not require it to do so. HS Co. was free to build such dams and ditches as it deemed appropriate, in such locations as it pleased, and to take whatever quantity of water it wanted, limited only by the appurtenant rights of downstream owners. See *Cross v. Hawaiian Sugar Co.,* 12 Haw. 415. G&R's right to any part of this water was limited to a proportion of the water which was in fact diverted.

21. A supplementary agreement was made between G&R and HS Co. on February 21, 1930, giving G&R the right to divert water from its "wet (taro) lands" in Koula, Manuahi and Hanapepe, but *not* "above the intakes of the present Koula and Olokele ditches." Nothing in this agreement impaired the right of HS Co. to the first chance at the waters; all it conferred on G&R was the right to take HS Co.'s leftovers. HS

Co. remained in control of the waters, having the upper hand because it had the upper dam.

22. Whether the waters taken by McBryde from the Hanapepe stream were those leased to HS Co. by G&R or not, the taking constituted an injury to G&R's inheritance for which G&R could have brought an action at common law or in equity throughout the measured period 1934-March 1949, or a statutory proceeding before the Commission of Private Ways and Water Rights to prevent McBryde from taking more waters than those to which it was entitled at all times during the measured period, 1934-March 1949.

*Wong Leong v. Irwin,* supra, at page 271; *Long v. Wai Fong,* 9 Haw. 628.

As a reversioner, being the lessor of HS Co., G&R had a cause of action during the measured period 1934-March 1949 for an injury to their inheritance because of the possibility of McBryde's acquiring prescriptive rights against the reversion.

23. Since, as shown in conclusion "15" herein, McBryde diverted 7 million gallons or more of water per day for a period of more than 10 years under a claim of right and such use was actual, open, notorious, continuous and hostile against the owners of such water, it has acquired title to such water by adverse use or prescription to the extent of the difference between 7 million gallons and the quantity of water to which it has appurtenant rights, to wit:

| | |
|---|---|
| | 7,000,000 gallons per day (quantity diverted) |
| Less | 4,915,400 |
| | 2,084,600 gallons per day |

### *Prescriptive Claim of McBryde for Rice Lands*

24. The lands for which McBryde claims a prescriptive use of water for rice lie in its ilis of Kuiloa and Eleele and LCA 3284:4. In each ili, and in LCA 3284:4, the lands so claimed is less than the land in that ili or award having appurtenant water rights.

The owner of water rights may use that water on any of his land, and is not limited to using it on the land to which it originally appertained. *Peck v. Bailey,* supra, at pages 665-6, 672; *Lonoaea v. Wailuku Sugar Co.,* supra, at page 665; *Wong Leong v. Irwin,* supra; *Foster v. Waiahole Water Co., Ltd.,* 25 Haw. 726; *Territory v. Gay,* supra.

Such a transfer does not create additional water rights, even if continued for the prescriptive period. *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.,* supra, at page 686:

> ". . . Where water has been transferred to kula land from ancient taro lands, the proprietor, after the use on the kula lands has continued for the statutory period, is too likely to be led to indulge in the view that the kula has acquired a prescriptive right to the water and that the taro lands have at the same time retained their ancient right and not lose it by abandonment. That, of course, is a mistaken view. Water rights cannot be doubled in that way. . . ."

In this case it may even be an exaggeration to say that the water was transferred, since it was used, not on other awards, but simply on another part of the same Land Commission award. In addition, once

Kuiloa, Eleele and LCA 3284:4 came into McBryde's hands (as they were in most of the period by which it claims prescription) water could be transferred to them from McBryde's other lands having appurtenant rights.

The evidence does not show that Kuiloa, Eleele, and LCA 3284:4, or any of them, was using more water in the claimed prescriptive period than it was entitled to by appurtenant rights. In the absence of such evidence, the claim of adverse use or prescription is not established.

### *Summary of Findings of Fact and Conclusions of Law*

Upon a thorough review of the law and the evidence above, the Court finds and concludes as follows:

1. The lands of the various parties entitled to appurtenant water rights in Hanapepe Valley are as follows:

| | |
|---|---|
| McBryde | 98.21 acres |
| State | 83.27 acres |
| G&R Koula & Manuahi | 90.00 acres |
| Below Koula & Manuahi | 30.63 acres |
| Others | 29.11 acres |
| Total | 331.22 acres |

2. The duty of water (quantity of water customarily used and necessary to grow an average crop of taro) in Hanapepe Valley below the junction of Koula and Manuahi streams at or immediately prior to the award or grant is 50,050 gallons per acre per day.

3. [As amended R7-246] By reason of their ownership of lands in Hanapepe Valley having appurtenant water rights, the parties are entitled to the following appurtenant water rights:

| | |
|---|---|
| McBryde | 4,915,400 gpd (rounded) |
| State | 4,167,650 gpd (rounded) |
| Other Land Owners | 1,456,950 gpd (rounded) |
| G&R (below Manuahi & Koula) | 1,533,050 gpd (rounded) |
| (Manuahi & Koula) | Unknown |

4. McBryde has acquired title to water in the Hanapepe River by adverse use or prescription to the extent of 2,084,600 gallons per day.

[Conclusion 23]

5. The evidence herein does not show that any of the rice lands for which McBryde claims prescriptive rights was using more water in the claimed prescriptive period than it was entitled to by appurtenant rights. In the absence of such evidence, the claim of adverse use or prescription is not established.

[Conclusion 24]

6. This Court holds that all the surplus waters of Koula and Manuahi streams, without distinction between "normal" or "storm or freshet" surplus, belong to G&R on whose land they arise.

[Conclusion 13]

7. The Court having fixed the appurtenant water rights of McBryde, the State, other land owners, and G&R as shown in conclusion "3" above, and also the prescriptive water rights acquired by McBryde, as shown in conclusion "4" above, and also by reason of G&R's being entitled to all surplus waters, as shown

in conclusion "6" above, it follows that G&R are entitled to all waters in excess of such waters to which the above named parties are entitled by reason of the ownership of their respective appurtenant water rights and prescriptive water rights.

8. The Court has thoroughly reviewed other issues raised during the course of the trial, but these findings of fact and conclusions of law cover all pertinent issues raised by the parties for the determination of water rights in Hanapepe Valley.

9. A judgment determining the rights of the parties will be entered. Counsel are directed to submit a form of such judgment not later than January 15, 1969.

Dated: Lihue, Kauai, Hawaii, December 10, 1968.

/s/ Benjamin M. Tashiro
Presiding Judge

Attest:
Barbara Haruki
Clerk

# APPENDIX H

## JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2264

DC CV 74-32

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs-Appellees*,

v.

GEORGE R. ARIYOSHI, Governor, *et al.*,
*Defendants-Appellants*,

and

McBRYDE SUGAR COMPANY, LIMITED, *et al.*,
*Defendant-Appellees*

[Dated May 23, 1985]

### JUDGMENT

APPEAL from the United States District Court for the District of Hawaii

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed in part, Vacated in Part, and remanded for the entry of a modified judgment.

Filed and entered February 20, 1985.

## APPENDIX I

## JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 84-32

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs*,

vs.

GEORGE R. ARIYOSHI, *et al.*,
*Defendants*.

### JUDGMENT

[Filed March 2, 1978]

This is an action for declaratory judgment and injunctive relief.

Pusuant to the decision of the Court rendered October 26, 1977,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The following definitions shall apply to this Judgment:

a. The phrase "defendant State Officials" refers to George R. Ariyoshi, Governor of the State of Hawaii, Ronald Y. Amemiya, Attorney General, Andrew S. O. Lee, Deputy Attorney General, William Y. Thompson, Stanley W. Hong, Larry E. Mehau, Manuel Moniz, Jr., and Takeo Yamamoto, Chairman and Members of the Board of Land and Natural Resources, as well as their successors in office, agents, servants, employees, and attorneys and those persons in active concert or participation with them who receive actual notice of this Judgment by personal service or otherwise.

b. The term "Small Owners" refers to defendants Ida Albarado, Helen B. H. Chu, Henry J. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriet U. Kano, Junichi Kano, Kiyoshi Kimata, Arold W. F. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Iwao Nonaka, Kazou Nonaka, Masatoshi Nonaka, Shigekichi Nonaka, Takano Nonaka and Takao Nonaka.

c. The term "normal surplus water" has the meaning given the term by *Territory v. Gay,* 31 Haw. 376 (1930), *aff'd,* 52 F.2d 365 (9th Cir.), *cert. denied,* 284 U.S. 671 (1931) and refers to all surface waters, other than "storm and freshet surplus waters," which are not required for the satisfaction of "prescriptive rights" or "appurtenant rights."

d. "*McBryde*" refers to the decision of the Hawaii Supreme Court in *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 502 P.2d 1330, *aff'd on rehearing,* 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed for want of jurisdiction and cert. denied,* 417 U.S. 962 (1974), and any judgments or orders entered pursuant thereto.

e. The term "Hanapepe River" includes its tributaries, Manuahi and Koula.

2. Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners are entitled (a) to transport waters of the Hanapepe River in which they have water rights for use beyond the watershed of origin or for use on lands other than those giving rise to water rights, and (b) to transfer their water rights in the waters of the Hanapepe River by deed, lease, or other conveyance with or without a transfer of the interest in the lands to which the water rights relate. Under the laws of the State of Hawaii, the Plaintiffs' ownership of the

rights to take normal surplus water, and the rights of Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners to transport waters in which they have water rights are vested property rights capable of sale, lease, transfer and other conveyance. Enforcement of *McBryde* contrary to the provisions of paragraph 3 hereof would result in an unconstitutional taking of vested property rights of the Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners. The defendant State Officials, unless enjoined, will seize, take, confiscate and appropriate the private water rights in the Hanapepe River from their rightful owners. Plaintiffs, McBryde Sugar Company, Limited and Olokele Sugar Company, Limited, and their predecessors in interest, have since the turn of the century operated sugar plantations on the Island of Kauai using waters from the Hanapepe River, and it is essential to the existence of the plantations that the plantations have a continuous supply of water from the Hanapepe River for irrigation. Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and their predecessors in interest have invested millions of dollars in their irrigation systems and the sugar cane operations of which such systems constitute a part. Interference by the defendant State Officials with the rights of Plaintiffs, McBryde Sugar Company, Limited, and Olokele Sugar Company, Limited, to withdraw water from the Hanapepe River and to transport it to their plantations would do substantial and irreparable injury and would be financially disastrous to them. Any interruption in their diversions would do immediate and irreparable damage to their growing crops. The Small Owners have appurtenant water rights and have been using water in part on land to which the water rights are not appurtenant, and, if unable either to continue such use or to sell such water rights to owners of other land, they would be substantially and irreparably injured. Precise ascertainment of the extent of the economic injury which would result from a failure to grant injunctive relief would be impossible.

3. The defendant State Officials are hereby permanently enjoined from:

a. Enforcing or attempting to enforce *McBryde* to the extent that it adjudicated (1) that Plaintiffs are not the owners of the water rights to the normal surplus waters of the Hanapepe River or (2) that Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and the Small Owners, to the extent of their water rights, may not transport waters from the Hanapepe River for use beyond the watershed of origin or for use on lands other than those giving rise to water rights;

b. Preventing or attempting to prevent the use by Plaintiffs or their lessee, Olokele Sugar Company, Limited, of the normal surplus waters of the Hanapepe River on the basis of *McBryde* or on the basis of a claim that Plaintiffs do not own or have water rights to the normal surplus waters of the Hanapepe River;

c. Preventing or attempting to prevent Plaintiffs, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, or the Small Owners from transporting from the Hanapepe River waters in which they have water rights for use beyond the watershed of origin or for use on lands other than those giving rise to water rights either on the basis of *McBryde* or on the basis of a claim that the water rights of said parties do not entitle them to utilize water beyond the watershed of origin or on lands other than those giving rise to water rights.

4. Nothing herein shall prohibit the defendant State Officials from instituting eminent domain proceedings for the acquisition (upon payment of just compensation) of all or any part of Plaintiffs' water rights or the water rights of any other party to this proceeding.

5. Because this Court is unable to positively conclude that a federal question is involved in the Counterclaim of McBryde Sugar Company, Limited, against the Plaintiffs for prescriptive water rights, said Counterclaim is dismissed without prejudice. The ultimate determination, to

be made in the light of the decision rendered and injunction granted herein, of the prescriptive water rights of McBryde Sugar Company, Limited, is left to the Hawaii Fifth Circuit Court sitting as statutory water commissioner and exercising the jurisdiction that was retained by the Amended Judgment in Special Proceeding No. 108 or to any other state court having jurisdiction thereof or of any appeal therefrom.

6. This Court hereby retains continuing jurisdiction in this case to hear and determine at any time hereafter any application which the parties may make with respect to this judgment and to take such action as may be necessary or appropriate to assure compliance with this judgment by the parties hereto and their successors.

**DATED**: Honolulu, Hawaii, Mar. 2, 1978.

Martin Pence
United States District Judge

**ATTEST**:

Clerk of the Above-Entitled Court

**APPROVED AS TO FORM**:

/s/ Peter G. Wheelon
J. Garner Anthony, Esq.
Peter G. Wheelon, Esq.
Attorneys for Plaintiffs

Andrew S. O. Lee, Esq.
Attorney for Defendants
State Officials

/s/ J. Russell Cades
J. Russell Cades, Esq.
Attorney for the Defendant McBryde
Sugar Company, Limited

/s/ Robert B. Bunn
Robert B. Bunn, Esq.
Attorney for Defendant
Ida Albarado, et al.

/s/ William F. Quinn
William F. Quinn, Esq.
Attorney for Defendant
Olokele Sugar Company,
Limited.

## APPENDIX J

## ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

No. 78-2364

D.C. No. CV 73-32

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs-Appellees*,

v.

GEORGE R. ARIYOSHI, Governor, *et al.*
*Defendants-Appellants*,

and

McBRYDE SUGAR COMPANY, LIMITED, *et al.*,
*Defendants.*

### ORDER

[Filed May 14, 1985]

BEFORE: GOODWIN and TANG, Circuit Judges, and
GRANT*, District Judge

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter enbanc. (Fed. R. App. P. 35.)

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* The Honorable Robert A. Grant, United States District Judge, Northern District of Indiana sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

## APPENDIX K

## COMPLAINT, FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

Civil No. 74-32

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs*,

v.

GEORGE R. ARIYOSHI, Acting Governor, *et al.*,
*Defendants.*

### COMPLAINT

[Feb. 14, 1974]

Plaintiffs herein allege:

*1.* That plaintiffs (other than Marion B. Keat) are residents of the County of Kauai, State of Hawaii; MARION B. KEAT is a resident of the State of New Jersey; defendant GEORGE R. ARIYOSHI is the Acting Governor of the State of Hawaii; defendants GEORGE T. H. PAI, ANDREW S. O. LEE are the Attorney General and Deputy Attorney General of the State of Hawaii; defendants SUNAO KIDO, NEWTON MIYAGI, LARRY E. MEHAU, MANUEL MONIZ, JR., MOSES W. KEALOHA and HISAO MUNECHIKA are the Chairman and Members of the Board of Land and Natural Resources of the State of Hawaii; defendant McBRYDE SUGAR COMPANY, LIMITED (hereinafter called "McBRYDE") and OLOKELE SUGAR COMPANY, LIMITED (hereinafter called "OLOKELE") are Hawaii corporations with their principal place of business in Honolulu, Hawaii; defendants IDA ALBARADO, et al. (SMALL OWNERS) are residents of the County of Kauai, State of Hawaii and are representatives of a class of all other persons having or claiming any interest in the waters of Hanapepe Valley, Kauai and will fairly and adequately represent and protect the interests of the class.

2. Plaintiffs are the successors in interest, as owners in fee simple, of the *ilis kupono* of Manuahi and Koula and the *ahupuaa* of Makaweli, of Francis Gay, Aubrey Robinson, Alice Robinson, Sinclair Robinson and Aylmer F. Robinson, defendants in the proceedings, *Territory* v. *Francis Gay, et al.*, 31 Hawaii 376 (1930); 52 F2d 356 (9th Cir. 1931), cert. denied 284 U.S. 677 (1931).

3. That the amount in controversy exceeds $10,000 exclusive of interest and costs.

4. The Court has jurisdiction under 28 USC §§ 1331, 1343, 2201, 2283 and 42 USC § 1983.

5. The case of *Territory* v. *Gay, supra*, was brought by the Territory of Hawaii to enjoin plaintiffs' predecessors in title from transporting the normal surplus water of Hanapepe stream to Makaweli, claiming that the Territory of Hawaii was the owner of such normal surplus or alternatively, if plaintiffs' predecessors owned the normal surplus, they were not entitled to use it except in Koula, Manuahi and Hanapepe. These claims were presented by the

Territory to the circuit court, the Supreme Court of Hawaii and the Court of Appeals. The courts held that plaintiffs' predecessors, as owners of the *ilis kupono* of Mannahi and Koula, owned the normal surplus water of Hanapepe, and were free to transport it wherever they wished.

*6.* The judgment in *Territory* v. *Gay* referred to above applied long and well-settled principles of Hawaiian water law that the "normal" flow belonged to the konohiki of the land on which the stream had its source, subject to "appurtenant" and "prescriptive" rights.

*7.* Plaintiffs and their predecessors, in reliance upon the judgment in *Territory* v. *Gay, supra,* and settled principles of Hawaiian water law, leased certain lands at Makaweli to Olokele and guaranteed an adequate supply of water essential to cultivating sugar cane, expended over $900,000 in building the Hononui tunnel to carry the waters of Koula stream directly and solely through lands belonging to plaintiffs outside Hanapepe Valley, and made capital improvements for the purpose of growing sugar cane on those lands and manufacturing sugar therefrom which will be impossible if water cannot be transported to those lands.

*8.* In 1959 an action was instituted by McBRYDE in the Circuit Court of the Fifth Circuit, *McBryde, etc. v. Robinson, et al.,* S.P. No. 108, to determine the water rights in Hanapepe Valley, Kauai. Jurisdiction of that court was based on HRS § 664-31 through 664-47. Plaintiffs and their predecessors in interest, the STATE of HAWAII, OLOKELE and SMALL OWNERS were joined as defendants. All parties including the STATE agreed that plaintiffs owned the normal surplus water and that water rights could be severed from the land to which they were appurtenant. At no time in the trial court did any party deny the right of plaintiffs or others to transfer and transport water out of the watershed. Plaintiffs McBRYDE and the STATE appealed. A chronology of the proceedings below and on appeal is hereto attached as Exhibit A.

*9.* On January 10, 1973, the Supreme Court in its decision in *McBryde v. Robinson, et al.* (54 Hawaii 174, 504

P2d 1330) held that the STATE was the owner of all normal surplus water, that neither plaintiffs nor any party could divert water out of the watershed and that no owner of appurtenant rights may use his water except on the land to which it is appurtenant.

In this decision the Supreme Court of Hawaii on its own motion raised issues not claimed or raised by any party in the trial court and not claimed or raised, argued briefed on appeal.

*10.* The decision overruled over 100 years of settled water law of Hawaii including *Territory v. Gay,* 31 Hawaii 376 (1930), 52 F2d 356 (1931); cert. denied 284 U.S. 677, and held that all surplus waters belonged to the State of Hawaii, subject only to the rights of appurtenant owners and that no owner of water rights had any right to transfer the waters out of the watershed of Hanapepe Valley.

*11.* Plaintiffs, defendants McBRYDE, OLOKELE and SMALL OWNERS filed petitions for rehearing on the grounds that said opinion was directly contrary to the settled law of Hawaii on water rights and that—

a) It is a denial of due process of law contrary to the Fourteenth Amendment;

b) Fails to give full faith and credit to the judgment of the Ninth Circuit Court of Appeals in *Territory v. Gay,* 52 F2d 356, cert. denied 284 U.S. 677, contrary to Article VI of the United States Constitution;

c) Destroys federally adjudicated property rights of plaintiffs;

d) Is contrary to settled principles of res judicata;

e) Constitutes the taking of private property without just compensation contrary to the Fifth Amendment.

The petitions were denied per curiam, copy of the denial by the majority is hereto attached and marked Exhibit B. Justices Levinson and Marumoto dissented from said opinion.

*12.* That on December 28, 1973, the Supreme Court, without notice or opportunity to be heard, entered a judgment and notice of judgment, copies of which are hereto attached and marked Exhibits C and D.

*13.* Defendants ARIYOSHI, PAI, LEE, KIDO, MIYAGI, MEHAU, MONIZ, KEALOHA and MUNECHIKA, under the laws of the State of Hawaii, have the right and duty of protecting the real property rights of the STATE OF HAWAII, including the purported right of the State under *McBryde v. Robinson, et al.* (54 Hawaii 174, 504 P2d 1330) to prevent plaintiffs from taking water from Koula and Manuahi to Makaweli. Plaintiffs claim the right to take such water to Makaweli, and that the threatened enforcement of said judgment would, under color of state law, deprive plaintiffs of their civil rights contrary to 42 USC 1983.

*14.* That unless this Court enjoins defendants named in paragraph 13 from interfering with the rights of plaintiffs, McBRYDE, OLOKELE and SMALL OWNERS, they will have no opportunity to be heard on the constitutional issues created but not decided by the Supreme Court and it is necessary to avoid irreparable damage to them and to preserve their constitutional rights that further proceedings carrying out the judgment of the Supreme Court be enjoined.

*15.* That this Court should declare that the rights of the parties to water in the Hanapepe Valley be determined in accordance with the settled law of Hawaii and should enjoin any further proceedings in the State courts until such determination is made.

WHEREFORE, plaintiffs pray:

*1.* That this Court issue a temporary injunction restraining further proceedings in the State courts until final determination of this complaint;

*2.* That this Court enter its judgment declaring the rights of the parties to the waters in Hanapepe Valley be determined in accordance with the settled law in force and effect prior to the decision and judgment of the Supreme Court in the case referred to in paragraphs 9 and 10 above;

3. That this Court issue a permanent injunction against the defendant officers of the STATE OF HAWAII, enjoining said defendants from interfering with plaintiffs' right to transport water from Manuahi and Koula to Makaweli or elsewhere out of the watershed of Hanapepe; and

4. That this Court grant such other relief as may be equitable in the premises.

DATED: Honolulu, Hawaii, February 14, 1974.

/s/ J. GARNER ANTHONY
J. Garner Anthony

/s/ JOHN H. R. PLEWS
John H. R. Plews

Attorneys for SELWYN A. ROBINSON,
et al., Plaintiffs

**Complaint Exhibit A**

## CHRONOLOGY

1959, Mar 24—Complaint filed, 5th Cir., S.P.108

1965—Trial—Circuit Court, 5th Circuit

1968, Dec 10—Decision of Judge Tashiro

1969, Jan 30—Amendments to decision and judgment

1969, Feb 28—Notice of appeal by G&R, McBryde and State

1971, Mar 2—Argument in Supreme Court

1973, Jan 10—Opinion of court, Marumoto, J. dissenting

1973, Jan 15—Order extending time for rehearing

1973, Mar 29—HSPA motion to appear

1973, Apr 3—HSPA petition denied

1973, Apr 13—Motion of Olokele to appear

1973, Apr 30—Motion of Olokele denied

1973, May 18—Selwyn A. Robinson et al. petition for rehearing with memorandum

1973, May 18—Petition for rehearing of "Small Owners"

1973, May 21—Petition by McBryde for rehearing

1973, Jun 18—Order entered for simultaneous briefs

1973, Aug 31—Motion for an order permitting official reporter at oral argument

1973, Sep 5—Order entered denying motion

1973, Sep 18—Oral argument on rehearing

1973, Dec 20—Per curiam denial of petitions for rehearing (Marumoto, J. & Levinson, J. dissenting)

1973, Dec. 28—Judgment on appeal

1973, Dec 28—Notice of judgment on appeal

**Complaint Exhibit B**

# IN THE SUPREME COURT OF THE STATE OF HAWAII

## OCTOBER TERM 1973

McBRYDE SUGAR COMPANY, LIMITED, *Plaintiff-Appellant, Cross-Appellee,* v. ALYMER F. ROBINSON, *et al., Defendants-Appellees, Cross-Appellants*

NO. 4879

APPEAL FROM FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, JUDGE
ON REHEARING

DECEMBER 20, 1973

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON, JJ., AND CIRCUIT JUDGE OGATA IN PLACE OF KOBAYASHI, J., DISQUALIFIED

*Per Curiam.* Subsequent to the filing of the decision in this case on January 10, 1973 (54 Haw. 174, 504 P.2d 1330 (1973)), petitions for rehearing were filed by some of the parties. By order of this court dated June 18, 1973, all the parties were requested to file supplementary briefs directed to the issues (1) whether HRS § 7-1[1] was material to the determination of the water rights of the parties, and (2) whether owners of parcels of land in the Hanapepe Valley, who were entitled to appurtenant water rights for taro raising at the time of the Mahele or the Land Commission Award, were entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant.

---

[1] The pertinent portion of HRS § 7-1 reads:

"... . The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use."

Arguments of the parties were heard at the rehearing had on September 18, 1973. After careful consideration of the briefs and arguments presented at the rehearing, we find no reason to change the decision filed herein.

/s/ William S. Richardson

/s/ Kazuhisa Abe

/s/ Thomas S. Ogata

J. Russell Cades and Robert B. Bunn (Cades, Schutte, Fleming & Wright of counsel) for McBryde Sugar Co., Ltd., plaintiff-appellant, cross-appellee.

John H. R. Plews (Anthony, Hoddick, Reinwald & O'Connor of counsel) for Selwyn A. Robinson, et al., defendants-appellees, cross-appellants.

Andrew S. O. Lee, Deputy Attorney General (Georgia Pai, Attorney General, of counsel) for State of Hawaii, defendant-appellee, cross-appellant.

William F. Quinn (Goodsill, Anderson & Quinn of counsel) for Olokele Sugar Co., Ltd., defendant.

Clinton Shiraishi (Shiraishi & Yamada of counsel) for Ida Albarado, et al., petitioners.

**Complaint Exhibit C**

NO. 4879

# IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING NO. 108

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, *et al.*,
*Defendants-Appellees, Cross-Appellants.*

APPEAL FROM FINAL JUDGMENT
DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, Judge

GEORGE PAI 609
Attorney General
State of Hawaii

ANDREW S. O. LEE 298
Deputy Attorney General

State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

*Attorneys for State of Hawaii*

## JUDGMENT ON APPEAL

[Filed December 28, 1973]

Pursuant to the opinion of this Court filed and entered on January 10, 1973, the judgment of the Circuit Court of the Fifth Circuit is affirmed in part; reversed in part.

DATED: Honolulu, Hawaii, Dec. 28, 1973.

BY THE COURT:

Clement J. H. Chun
Clerk

APPROVED:

/s/ KAZUHISA ABE
Justice

[SEAL]

Complaint Exhibit D

NO. 4879

## IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

SPECIAL PROCEEDING NO. 108

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, *et al.,*
*Defendants-Appellees, Cross-Appellants.*

APPEAL FROM FINAL JUDGMENT
DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, Judge

### NOTICE OF JUDGMENT ON APPEAL

[Filed December 28, 1973]

TO THE HONORABLE PRESIDING JUDGE IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT, STATE OF HAWAII:

PLEASE TAKE NOTICE that in the above-entitled cause the Supreme Court of the State of Hawaii has entered the following Judgment on Appeal:

> "Pursuant to the opinion of this Court filed and entered on January 10, 1973, the judgment of the Circuit Court of the Fifth Circuit is affirmed in part; reversed in part."

DATED: Honolulu, Hawaii, December 28, 1973.

BY THE COURT:

/s/ Clement J. H. Chun
Clerk

The form of the foregoing notice is approved and IT IS ORDERED that the same issue forthwith.

/s/ Kazuhisa Abe
Justice

# APPENDIX L

## STATE DEFENDANTS' MOTION TO DISMISS COMPLAINT

**Civil No. 74-32**

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs*,

vs.

GEORGE R. ARIYOSHI, Acting Governor, *et al.*,
*Defendants.*

**MOTION TO DISMISS COMPLAINT; MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION TO DISMISS; NOTICE OF MOTION; EXHIBIT "A" and EXHIBIT "B"**

## MOTION TO DISMISS COMPLAINT

[Filed March 21, 1974]

The Defendants, George R. Ariyoshi, Acting Governor, George T. H. Pai, Attorney General, Andrew S. O. Lee, Deputy Attorney General, Sunao Kido, Newton Miyagi, Larry E. Mehau, Manuel Moniz, Jr., Moses W. Kealoha and Hisao Munechika, Chairman and Members, Board of Land and Natural Resources, by their Attorney, John Campbell, Jr., moves this Court as follows:

1. To dismiss this action because the Court lacks jurisdiction of the subject matter for reason that the above-named Defendants are officers of the State of Hawaii and that this suit is in substance an action against the State of Hawaii which has not consented to be sued or waived its immunity from suit.

2. To dismiss the action for failure to state a claim upon which relief can be granted because no collateral attacks should be permitted upon a State Court proceeding which has already been completed and is *res judicata.*

3. To dismiss this action for failure to state a claim upon which relief may be granted because 42 U.S.C. § 1983 may not be employed to collaterally attack a State court judgment and relitigate issues it has decided.

This Motion is made pursuant to Rule 12 of the Federal Rules of Civil Procedure and Memorandum of Authorities attached hereto.

DATED: Honolulu, Hawaii, March 21, 1974.

/s/ John Campbell, Jr.
Deputy Attorney General
Attorney for Defendants Above

[Material Deleted in Printing]

# APPENDIX M

## TRANSCRIPT OF HEARING ON STATE DEFENDANTS' MOTION

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

**Civil No. 74-32**

**SELWYN A. ROBINSON, ELEANOR ROBINSON, RUSSELL S. ROBINSON, RUTH R. LeFIELL, MARION R. KEAT, JEAN R. WEIR, SELWYN A. ROBINSON, ELEANOR ROBINSON, BRUCE B. ROBINSON, Trustees under the Will of AYLMER F. ROBINSON, HELEN M. ROBINSON, Individually and as Executrix, Estate of LESTER B. ROBINSON, BRUCE B. ROBINSON and KEITH P. ROBINSON,**

*Plaintiffs,*

**vs.**

**GEORGE R. ARIYOSHI, Acting Governor, GEORGE T. H. PAI, Attorney General, ANDREW S. O. LEE, Deputy Attorney General, SUNAO KIDO, NEWTON MIYAGI, LARRY E. MEHAU, MANUEL MONIZ, JR., MOSES W. KEALOHA and HISAO MUNECHIKA, Chairman and Members, Board of Land and Natural Resources, MC BRYDE SUGAR COMPANY, LIMITED, OLOKELE SUGAR COMPANY, LIMITED, IDA ALBARADO, HELEN B. H. CHU, HENRY J. CHU, CHEE KUNG FUI SOCIETY, LAPAZ FRANCISCO, MARCELLINO FRANCISCO, ALBERT K. KAAILAU, LINDA P. KAIAKAPU, ANN N. KALI, HARRIET U. KANO, JUNICHI KANO, KIYOSHI KIMATA, ARNOLD W. F. LEONG, KATHERINE A. LEONG, LO SUN D. LEONG, TAI HING LEONG, HANAYO T. NAUMU, WALLACE A. NAUMU, HIDEO NONAKA, HIROMI NONAKA, IWAO NONAKA, KAZUO NONAKA, MASATOSHI NONAKA, SHIGEKICHI NONAKA, TAKANO NONAKA and TAKAO NONAKA (SMALL OWNERS),**

*Defendants.*

## TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Friday, September 6, 1974, at 9:00 A.M., at Honolulu, Hawaii,

*BEFORE:*

HONORABLE MARTIN PENCE
United States District Judge
District of Hawaii

*APPEARANCES:*

J. GARNER ANTHONY, Esq.
JOHN H. R. PLEWS, Esq.
Anthony, Hoddick, Reinwald & O'Connor
333 Queen Street
Honolulu, Hawaii
*Attorneys for Plaintiffs;*

JOHN CAMPBELL, JR., Esq.
ANDREW S. O. LEE, Esq.
Deputy Attorneys General
State of Hawaii
415 South Beretania Street
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*Attorneys for Defendants State officers;*

J. RUSSELL CADES, Esq.
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Honolulu, Hawaii
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Goodsill, Anderson & Quinn
1600 Castle & Cooke Bldg.
Honolulu, Hawaii
*Attorney for Defendant Olokele Sugar Co., Ltd.*

THE CLERK: Civil 74-32, Selwyn A. Robinson and others vs. George Ariyoshi. This hearing is called on a motion to dismiss.

[Material Deleted in Printing]

[65] THE COURT: Thank you very much.

As indicated in the beginning, this is simply a hearing on a motion to dismiss filed by the State.

MR. ANTHONY: If Your Honor please, . . .

THE COURT: Oh, pardon me, Mr. Anthony. I thought that all had been said——

MR. ANTHONY: No, I didn't participate.

THE COURT: And I wouldn't shut you off right now.

MR. ANTHONY: I think the matter is so clear it doesn't need any further argument, but I would like to leave with the Court a copy of our petition for cert. in the Supreme Court.

THE COURT: File the same along with the joint appendix [66] of jurisdictional statement and so forth.

Does the State wish to do anything like that also?

MR. CAMPBEL: We have nothing else to submit, Your Honor.

MR. CADES: Your Honor, maybe Your Honor should have the Tyrone decision. I thought that——

THE COURT: I want all of this, but you will gather, gentlemen, I'm going to rule right now.

MR. CADES: Yes, I know, but I just want to file it with the Court. The same——

THE COURT: The same may be filed.

MR. CADES: This was the appeal and petition for certiorari granted by—filed by McBryde.

MR. CAMPBELL: We'd like to point out, Your Honor, those are the arguments they advanced in the United States Supreme Court and they were rejected.

THE COURT: You have had an opportunity to see how much time I've had to review them because, as I've said, I'm ready to rule right now.

The three grounds set forth basically in the motion to dismiss are the Court lacks jurisdiction of the subject matter for the—are officers of the State and the suit is not—is in substance an action against the State which has not consented to be sued or waived its immunity to be sued. And, oddly enough, it's only a motion to dismiss the complaint [67] and not the cross complaints, but——

MR. CAMPBELL: Your Honor, that was held in abeyance pursuant to your order of April 8th. No other things were supposed to be . . . . We would ask that that be considered against the cross complaint——

THE COURT: Thank you very much. Now that clears up the whole——

MR. CAMPBELL: If the Court will allow that.

THE COURT: Thank you very much. It's allowed. I've heard arguments from all parties. Thank you very much. So that I'll take it as a motion to dismiss not only the complaint, but the cross complaints.

As to the grounds set forth in Statement No. 1, this Court feels that Kent State, Ex Parte Young, Edelman vs. Jordan, all state that there is no—that the fact that the State hasn't consented to be sued or waived immunity is not pertinent because it doesn't bar—this Court is not barred and enjoined—to enjoin an unconstitutional act of State officials and that's the basis upon which the complaints and cross complaints are laid that if the State officials attempt to enforce the decision of the—pardon me—the opinion of the State Supreme Court, they are engaging in an unconstitutional act. So, the Court on that ground would deny the motion to dismiss. I should say: Deny the motion to dismiss on that ground.

No. 2 is to dismiss the action for failure to state [68] a claim upon which relief can be granted because no collateral attack should be permitted on a State court proceeding which has already been completed and res judicata. Now it's clear from all that has been said here that the lower State court did not decide the issues which are now before this Court. Rather, the Court created the issue sua sponte and never even decided, as has been spelled out in detail by the plaintiffs here—yes, by the plaintiffs here—and by the cross complainants that the federal issues, the unconstitutional issues were never considered by the Court on—State Supreme Court on appeal, but rather the issues were limited to such a narrow grounds that the Supreme Court denied to the appellants the right to argue the constitutional aspects of the State court's decision. The question here before the Court, it seems from the discussion which has occurred, as it did to the Court, that there was an underlying federal question here arising out of the fact that during the existence of the territory these properties were properties of the United States which were in issue. And so the rights which all of the aggrieved parties secured by virtue of the law set forth in Territory v. Gay and all of the other cases during the time that the United States "owned" the public domain of Hawaii that those rights then were rights acquired as federal rights.

The State of Hawaii under the Admission Act only secured such public domain, such property as the territory had [69] and nothing more, except as specifically given. So that if rights which it is claimed—pardon me—I'll change that. If, as here, the plaintiffs claim rights acquired under the United States which they indicate could not—which the plaintiffs indicate perhaps were never transferred to the State of Hawaii at all, those rights, if the State attempts to challenge them, certainly bring into the—this Court a federal question and brings the issue of the due process aspect of res judicata on one hand and the plaintiff should have a right to show what water they actually acquired from—whatever water rights they had under the federal law and what water rights they retained as a result of that federal based decision back there in 1931.

Also, the due process issue—the federal question—is raised by the notice requirement. Namely, that it appears clearly here that some of the parties—Olokele, as Mr. Quinn indicated, and the little people, as Mr. Bunn indicated—had no notice whatsoever of any issue involving them before the Supreme Court and they were the innocent bystanders who were shot down by the machine gun blast without having had any warning that they had been marked for destruction, when there was no evidence that they were even in danger. They had no opportunity whatsoever to litigate the issues. This appears on the pleadings right now, so that the problem also of due process and also under Hughes v. Washington and the [70] Bonelli Cattle case and all indicate that if there is a taking without just compensation, even by a new case of the Court, that that, too, raises a federal question. So that even if a State court has "decided an issue," if that State court by its decision takes without just compensation, as indicated in the cases I just cited, that, too, presents a federal question.

Now—so the grounds—the motion for—to dismiss for failure to state a claim, No. 2, is denied.

No. 3, failure to state a claim upon which relief may be granted under 42 USC 1983, here were issues which were—it's claimed that they were being employed to collaterally attack a State court judgment and relitigate issues it has decided. It's clear to me that certain issues which are the key and the heart here were never litigated in the beginning. That's the complaint. That's all I can go by. I'm not deciding that they weren't, but that's the complaint and there's nothing here before the Court at this time to indicate to the contrary, and so that under 42 USC, it is permissible to attack a State court judgment, so that I would hold that that motion to dismiss for failure to state a claim for which relief may be granted under 42 USC 1983 is denied.

At this time I don't find it necessary to say—to find that the State waived its sovereign immunity when it appealed Territory v. Gay. At that time the basic sovereign [71] was the United States and I've covered it under the second ground. Motion of the State to dismiss is denied.

Now, gentlemen, I'm going to hold a pretrial here for a few moments. We're going to take about a two or three-minute recess. Only those persons will be permitted in the courtroom who are involved directly in the case here. We're going to talk about what's to be done from here on out and so forth. So that we'll take a two-minute recess, the courtroom will be cleared of everyone except counsel and parties involved.

(Whereupon, the proceedings adjourned at 11:20 A.M., September 6, 1974.)

I, Terrence Chun, Official Court Reporter, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 74-0032, Selwyn A. Robinson, et al. vs. George R. Ariyoshi, et al., at Honolulu, Hawaii, on September 6, 1974, before the Honorable Martin Pence, United States District Judge.

May 23, 1978 /s/ Terrence Chun

# APPENDIX N

## ORDER DENYING MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 74-32

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs,*

v.

GEORGE R. ARIYOSHI, *et al.*,
*Defendants.*

## ORDER DENYING MOTION TO DISMISS

[Filed September 9, 1974]

The motion to dismiss filed by defendants George R. Ariyoshi, et al., having come on for hearing on September [illegible], 1974, IT IS HEREBY ORDERED that the motion to dismiss is denied.

DATED: Honolulu. Hawaii, September 9, 1974.

/s/ Martin Pence
Martin Pence
United States District Judge

ATTEST:
/s/ Walter A. Y. H. Chinn
Clerk

# APPENDIX O

## ANSWER BY STATE DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

**Civil No. 74-32**

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs,*

vs.

GEORGE R. ARIYOSHI, Acting Governor, *et al.*,
*Defendants.*

### ANSWER TO COMPLAINT

[Filed September 16, 1974]

Come now Defendants George R. Ariyoshi, Acting Governor, George T. H. Pai, Attorney General, Andrew S. O. Lee, Deputy Attorney General, Sunao Kido, Newton Miyagi, Larry E. Mehau, Manual Moniz, Jr., Moses W. Kealoha and Hisao Munechika, Chairman and Members, Board of Land and Natural Resources (hereinafter referred to as "Defendants"), by their attorneys, Department of the Attorney General, State of Hawaii, and allege and aver in answer to Plaintiffs' Complaint as follows:

#### FIRST DEFENSE

The Complaint fails to state a claim against the Defendants upon which relief can be granted.

#### SECOND DEFENSE

Plaintiff is estopped or barred by the doctrine of *res judicata* and collateral estoppel from asserting the claims alleged in the Complaint.

## THIRD DEFENSE

Plaintiff is estopped or barred under the doctrine of sovereign immunity from asserting the claims alleged in the Complaint.

## FOURTH DEFENSE

Plaintiff is estopped or barred from asserting the claims alleged in the Complaint because the Court lacks jurisdiction over the subject matter.

## FIFTH DEFENSE

1. Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraphs 2, 3 and 7 of the Complaint.

2. Defendants deny each and every allegation contained in paragraphs 4, 6, 8, 12, 14 and 15 of the Complaint.

3. Defendants admit the allegations of paragraph 1 concerning the State offices held by Defendants and are without knowledge or information sufficient to form a belief as to the truth of the other allegations therein.

4. Defendants admit the allegation of paragraph 5 that *Territory v. Gay*, 31 Haw. 376 (1930), 52 F.2d 356 (9th Cir. 1931), was a suit brought by the Territory of Hawaii and deny the other allegations therein.

5. Defendants admit the allegations of paragraph 9 insofar as it correctly states the holding of the Hawaii Supreme Court decision in *McBryde v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), on rehearing, 55 Haw. 260, 517 P.2d 26 (1973), cert. denied, U.S. Supreme Court (June 17, 1974), and deny the other allegations therein.

6. Defendants admit the allegations of paragraph 10 to the extent it correctly states the holding of *McBryde v. Robinson*, supra, and deny the other allegations therein.

7. Defendants admit the allegation of paragraph 11 that Plaintiffs, McBryde, Olokele and Small Owners, filed peti-

tions for rehearing in *McBryde v. Robinson*, supra, and deny all other allegations therein.

8. Defendants admit the allegations of paragraph 13 concerning the duty of Defendants to protect the property rights of the State of Hawaii and deny the other allegations therein.

9. Defendants hereby deny all allegations of the Complaint not previously admitted, controverted or denied.

WHEREFORE, Defendants pray:

1. The Complaint herein be dismissed.

2. For such other and further relief as may be just and equitable.

DATED: Honolulu, Hawaii, September 16, 1974.

/s/ John Campbell, Jr.
JOHN CAMPBELL, JR.
Deputy Attorney General
State of Hawaii

# APPENDIX P

## STATE DEFENDANTS' DESIGNATION OF PORTIONS OF THE STATE COURT AND UNITED STATES SUPREME COURT RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 74-32

SELWYN A. ROBINSON, *et al.*,
*Plaintiffs*,

vs.

GEORGE R. ARIYOSHI, *et al.*,
*Defendants.*

## DESIGNATION OF PORTIONS OF THE RECORD IN SPECIAL PROCEEDINGS NO. 108, SUPREME COURT OF HAWAII NO. 4879, and THE SUPREME COURT OF THE UNITED STATES

[Filed April 1, 1975]

The State of Hawaii designates the following portions of the record in the captioned matters:

**S.P. No. 108 in the Fifth Circuit Court**

| | *Filed* |
|---|---|
| Complaint and Summons | March 24, 1959 |
| Amended Complaint and Summons | April 25, 1960 |
| Answer to Amended Complaint by State of Hawaii | May 25, 1960 |
| Answer of Kiyoshi Kimata | June 15, 1960 |
| Answer of Toshio Komaki and Lily A. Komaki | June 15, 1960 |

| | |
|---|---|
| Answer of Marcellino & Lapaz Francisco | June 15, 1960 |
| Answer of Hideo Nonaka | June 15, 1960 |
| Answer of Chee Kung Fui Society | June 15, 1960 |
| Answer of Junichi & Harriet U. Kano | June 15, 1960 |
| Answer of Yuji Shimomura | June 15, 1960 |
| Motion for Order Authorizing Service by Publication and Affidavit in Support of Motion for Order Authorizing Service by Publication | August 8, 1960 |
| Order Authorizing Service by Publication | August 8, 1960 |
| Legal Notice—Notice of Action to Determine Water Rights | August 8, 1960 |
| Answer to Amended Complaint by Respondents Robinsons | Jan. 31, 1961 |
| Answer to Amended Complaint by Olokele Sugar Co., Ltd. | Feb. 6, 1961 |
| Motion for Order Authorizing Service by Publication | Aug. 15, 1963 |
| Order Authorizing Service by Publication and Notice | Aug. 15, 1963 |
| Affidavit of Publication | Sept. 13, 1963 |
| Order of Default | Sept. 13, 1963 |
| Withdrawal of Counsel, Morris S. Shinsato | April 21, 1965 |
| Responses to Requests for Admissions with Stockholders' Lists | April 22, 1965 |
| Trial Brief of McBryde Sugar Co., Ltd. | April 30, 1965 |
| Trial Brief on Behalf of G&R, Defendants | May 3, 1965 |
| Trial Brief of the State | May 4, 1965 |

| | |
|---|---|
| Schedule of Exhibits for State (Respect to Land Commission Awards) | May 4, 1965 |
| Pre-Trial Order | May 4, 1965 |
| G&R Memorandum re Admissibility of Evidence | July 12, 1965 |
| Memorandum in Support of Plaintiff's Objection to the Introduction in Evidence of G&R H-1; 2; 3 and G&R D-3a; 4a for identification | July 12, 1965 |
| Memorandum of Authorities (State) | July 12, 1965 |
| Opening Brief of State of Hawaii | Sept. 18, 1965 |
| Plaintiff's Opening Brief and Plaintiff's Proposed Findings of Fact and Conclusions of Law | Sept. 20, 1965 |
| (Answering) Brief on Behalf of Gay & Robinson | Oct. 25, 1965 |
| Reply Brief on Behalf of State of Hawaii | Nov. 15, 1965 |
| Plaintiff's Reply Brief | Nov. 15, 1965 |
| Plaintiff's Additional Proposed Finding of Fact | Nov. 15, 1965 |
| Proposed Findings of Fact & Conclusions of Law | Dec. 17, 1965 |
| McBryde Sugar Company's Submission of Further Findings of Fact & Evidence Applicable Thereto | April 18, 1966 |
| Proposed Findings of Fact and Conclusions of Law on Behalf of State of Hawaii | April 19, 1966 |
| Motion for Reconsideration, Substitution of Parties and Entry of Judgment, Affidavit, Exhibit A and Memo in Support of Motion | Jan. 15, 1969 |

| | |
|---|---|
| Notice of Entry of Judgment | Jan. 24, 1969 |
| Motion to Amend Findings of Fact and Judgment, Memorandum in Support of Motion and Memorandum re Motion of G&R for Amendment | Jan. 27, 1969 |
| Motion to Amend Findings and Judgment Supplemental Memorandum, Notice | Jan. 27, 1969 |
| Motion to Amend Judgment, Memorandum in Support Thereof and Notice | Jan. 27, 1969 |
| Amendment to Decision | Jan. 30, 1969 |
| Amended Judgment | Jan. 30, 1969 |
| Order Further Amending Decision | Jan. 31, 1969 |
| Notice of Appeal—J. Garner Anthony | Feb. 28, 1969 |
| Designation of Record on Appeal | Feb. 28, 1969 |
| Notice of Appeal and Designation of Record on Appeal—Robert B. Bunn | Feb. 28, 1969 |
| Notice of Appeal to the Supreme Court—Andrew S. O. Lee | Feb. 28, 1969 |
| Designation of Record on Appeal | Feb. 28, 1969 |

[Material Deleted in Printing]

*RECORD IN THE SUPREME COURT OF HAWAII NO. 4879:*

Letter dated May 5, 1969, to Chief Clerk from Clerk, Fifth Circuit Court re transmitting Record on Appeal.

Certified Record on Appeal, filed May 8, 1969.

Letter dated May 15, 1969, to Mr. Edward Suzuki from Tokiko Nakamura, Clerk, Fifth Circuit Court re transmitting Supplemental Record on Appeal for filing.

Supplemental Record on Appeal, filed May 16, 1969.

Brief on Behalf of Selwyn A. Robinson, et al., Appellants, filed December 29, 1969.

Appendix to Brief on Behalf of Selwyn A. Robinson, et al., Appellants, filed December 29, 1969.

Opening Brief of State of Hawaii, Defendant-Appellee, Cross-Appellants, filed December 29, 1969.

Opening Brief of McBryde Sugar Company, Ltd., filed December 29, 1969.

Answer to the Opening Brief of McBryde Sugar Co., Ltd., filed June 1, 1970.

Answering Brief of the State of Hawaii to the Opening Brief Gay & Robinson filed June 1, 1970.

Answering Brief on Behalf of Selwyn A. Robinson, filed June 1, 1970.

Appendix to Answering Brief on Behalf of Selwyn A. Robinson, et al., filed June 1, 1970.

Answering Brief of McBryde Sugar Company, Ltd., filed June 1, 1970.

Reply Brief on Behalf of Selwyn A. Robinson, et al., Appellants filed September 30, 1970.

Reply Brief of McBryde Sugar Company, Limited, filed September 30, 1970.

Reply Brief of the State of Hawaii to the Answering Brief of G & R and Appendix "A", filed September 30, 1970.

Memorandum on Behalf of Selwyn A. Robinson, et al., Appellants, filed March 11, 1971.

Opinion of the Court, filed January 10, 1973.

Order Extending Time (May 20, 1973) to file Petition for Rehearing, filed January 15, 1973.

Motion for Leave to File, as Amicus Curiae, a Petition for Rehearing or a Brief in Support of a Party's Petition Affidavit and Memorandum, filed March 29, 1973.

Consent to Appearance of Hawaiian Sugar Planters' Assn. as Amicus Curiae and to Entry of Order Granting Motion filed April 2, 1973.

Decision of the Court, filed April 3, 1973.

Motion for Partial Vacation of Opinion or for Opportunity to Present Evidence and Argument Memorandum in Support of Motion, filed April 13, 1973.

Decision of the Court, filed April 30, 1973.

Petition for Rehearing on Behalf of Appellants Selwyn A. Robinson, et al., filed May 18, 1973.

Points and Authorities on Behalf of Appellants, Selwyn A. Robinson, et al., filed May 18, 1973.

Letter correcting error in Points and Authorities on Behalf of Appellants, dated May 18, 1973.

Petition for Rehearing or Motion for Modification or Vacation of Opinion heretofore Rendered and for Opportunity to Present Evidence and Argument of Ida Albarado, et al., Appendices Certificate of Counsel and Certificate of Mailing, filed May 18, 1973.

Petition for Rehearing Appendices Certificate of Counsel Certificate of Service, filed May 21, 1973.

Order (Re: Additional Briefs by August 15, 1973) filed June 18, 1973.

Motion for Leave to File a Brief, filed June 26, 1973.

Order (Granting Motion for Olokele Sugar Co., Ltd., to file brief) filed June 29, 1973.

Brief on Behalf of Selwyn A. Robinson, et al., pursuant to Order of June 18, 1973 filed August 15, 1973.

Brief on Rehearing of McBryde Sugar Co., Ltd., Appendices and Certificate of Service, filed August 15, 1973.

Brief, per Order of June 18, 1973, on Behalf of Ida Albarado, et al., Appendix and Certificate of Mailing, filed August 15, 1973.

Supplemental Brief on Behalf of State of Hawaii, filed August 15, 1973.

Brief in Response to Order Granting Limited Rehearing Certificate of Service, filed August 15, 1973.

Citation of Authorities of McBryde Sugar Co., Ltd., Relanting to the State's Power to Divert and Transport Water and Certificate of Mailing, filed October 5, 1973.

Decision of the Court (after rehearing), filed December 20, 1973

Judgment on Appeal, filed December 28, 1973.

Notice of Judgment on Appeal, filed December 28, 1973.

Receipt for Judgment and Notice of Judgment on Appeal, dated January 4, 1974.

*RECORD IN THE UNITED STATES SUPREME COURT:*

All Briefs, Jurisdictional Statements and other matters filed in the United States Supreme Court.

DATED: Honolulu, Hawaii, April 1, 1975.

/s/ Andrew S. O. Lee
ANDREW S. O. LEE
Deputy Attorney General
Attorney for State of Hawaii

# APPENDIX Q

## AMENDED COMPLAINT, *McBRYDE SUGAR CO. v. ROBINSON, ET AL.*, SPECIAL PROCEEDING NO. 108

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

**Action to Determine**
**Water Rights**

AT CHAMBERS

McBRYDE SUGAR COMPANY, LIMITED,
*Petitioner,*

v.

ALICE ROBINSON, SINCLAIR ROBINSON, AYLMER F. ROBINSON, SELWYN A. ROBINSON, ELEANOR ROBINSON and LESTER B. ROBINSON, individually and as co-partners doing business under the firm name of GAY AND ROBINSON, *et al.*,
*Respondents.*

### AMENDED COMPLAINT

[Filed April 25, 1960]

TO THE HONORABLE, THE PRESIDING JUDGE SITTING AT CHAMBERS, to Hear and Determine Controversies Respecting Rights of Private Ways and Water Rights.

Petitioner above named complaining of Alice Robinson, Sinclair Robinson, Aylmer F. Robinson, Selwyn A. Robinson, Eleanor Robinson and Lester B. Robinson, individually and as co-partners doing business under the firm name of Gay and Robinson, Respondents above named, pursuant to Rule 15(a) of the Hawaii Rules of Civil Procedure, respectfully presents and shows as follows:

## I

The Petitioner and Respondent, Olokele Sugar Company, Limited, are corporations organized and existing under the laws of the State of Hawaii.

## II

Respondents, Alice Robinson, Sinclair Robinson, Aylmer F. Robinson, Selwyn A. Robinson, Eleanor Robinson and Lester B. Robinson, are residents of the Island and County of Kauai, State of Hawaii, and are co-partners doing business under the firm name of Gay and Robinson.

Respondents, Lily A. Komaki, also known as Lily A. Kamaki and as Lilly A. Komaki, Robert K. Kali, Tai Hing Leong, Ida K. Horner, Hideo Nonaka, Toshio Komaki, Yuji Shimomura, Kiyoshi Kimata, Violet A. K. Makanui, Betty P. Makanui, Joseph K. Makanui, Bernard H. Makanui, May M. Corr, J. Nonaka, Junichi Kano, Harriet U. Kano, Fannie K. Peters, Chee Kung Fui Society, Tai Hing Leong, Trustee for Bart Dai Sin Mew Church, Alfredo A. Gubaton, Oliva F. Gubaton, Benito Francisco, Severina Francisco, Marcellino Francisco, Lopez Francisco, Kauanui Kaluna, Henry J. Chu and Andrew Halalu, are residents of said Island and County of Kauai; Respondents, Wilfred K. Dung, also known as Wilfred A. Dung, Ernest K. Paalua, Albert K. Kaaikau, Julia L. Makanui, Leialoha Dung, Annie L. Ching, Dai Chew Chang, Elizabeth Y. Chang, Abraham K. Apei, Claude M. Kapukui, Wallace A. Naumu and Hinayo T. Naumu, are residents of the City and County of Honolulu, State of Hawaii; Respondent, James W. Smith, is a resident of the Island, County and State of Hawaii, and the residences of the remaining individual Respondents, unknown heirs of J. B. Kaealii, William H. Makanui, Jr., George Makanui, unknown heirs of Louisa Mokunui, Shirley M. Mokunui, Morris Mokunui, Abraham Mokunui, George Mokunui and unknown heirs of Rachael K. Kaohi, above named, are to the Petitioner unknown.

## III

As is hereafter more fully presented, a controversy, subject to determination and settlement under the provisions of Part III of Chapter 234 of the Revised Laws of Hawaii 1955, exists between Petitioner and Respondents, Alice Robinson, Sinclair Robinson, Aylmer F. Robinson, Selwyn A. Robinson, Eleanor Robinson and Lester B. Robinson, individually and as co-partners doing business under the firm name of Gay and Robinson, respecting Petitioner's rights to water and the use of water flowing or that should flow through and in the Hanapepe River in the Ahupuaa of Hanapepe, situate in the District of Kona, Island and County of Kauai, State of Hawaii. For convenience of reference said Alice Robinson, Sinclair Robinson, Aylmer F. Robinson, Selwyn A. Robinson, Eleanor Robinson and Lester B. Robinson, individually and as such co-partners, will at all times hereinafter be referred to collectively as "Respondents Robinsons and Gay and Robinson."

## IV

The headwaters of Hanapepe River are in the Ilis of Koula and Manuahi which form the whole mauka portion of the Ahupuaa of Hanapepe and constitute the upper Hanapepe Valley. The Ilis of Koula and Manuahi are comprised of gulches or valleys reaching up and toward Mount Waialeale, the rainfall of which is, with the possible exception of one place in India, the heaviest known in the world. The rainfall in the upper Hanapepe Valley is itself very heavy, which, with a terrain consisting of deep-cut valleys and gulches, insures a relatively steady stream flow even in periods of dry weather. Koula Stream, running through the Ili of Koula, and Manuahi Stream, running through the Ili of Manuahi, join at a point near the southern boundary of the Ili of Koula to form the Hanapepe River which flows in a southerly direction through the lower Hanapepe Valley to the sea.

The Ilis of Koula and Manuahi, constituting the upper Hanapepe Valley as aforesaid, are wholly owned and controlled by Respondents Robinsons and Gay and Robinson.

The amount of water flowing in and through or that should flow in and through the said Hanapepe River in its course through the said Hanapepe Valley is not less than 32,000,000 gallons per day of constant flow, as is illustrated for the period 1934-1948 on the chart hereto attached, marked Exhibit A and by reference made a part hereof, said amount being established by reference to the duration discharge curve on Exhibit A entitled "Total Water Available, 1934-1948" and being measured and computed at ninety per cent (90%) of the time on said duration curve.

## V

Petitioner is the owner (subject to minor exclusions) of the lands comprising and the Konohiki of the Ilis Kupono of Eleele and Kuiloa, which are likewise within the Ahupuaa of Hanapepe and are situated in the lower Hanapepe Valley. The Hanapepe River runs through the Ilis of Eleele and Kuiloa.

## VI

As is more particularly set forth hereinafter, Petitioner has acquired and still has certain rights to water and the use of water flowing or that should flow through and in the said Hanapepe River in an amount of not less than 11,000,000 gallons per day of constant flow. In addition to the right to receive and take water from the Hanapepe River in the amount of at least 11,000,000 gallons per day of constant flow, Petitioner, as the owner of the Ilis Kupono of Eleele and Kuiloa is entitled to receive, take and use for irrigation purposes a reasonable and just proportion of the normal storm and freshet waters flowing in and through or that should flow in and through the Hanapepe River in its course through said Ilis of Eleele and Kuiloa.

## VII

Subsequent to March 30, 1949, Respondents Robinsons and Gay and Robinson, by means of a dam or dams across the Koula Stream and a new system of ditches and tunnels, diverted and conveyed away and are now diverting and conveying away to lands controlled by Respondent, Olokele Sugar Company, Limited, in Makaweli and to other lands controlled by said Respondents Robinsons and Gay and Robinson without the Ahupuaa of Hanapepe large quantities of water, in excess of the amounts theretofore diverted and so taken by said Respondents, from the normal flow of said Koula Stream into the Hanapepe River.

## VIII

The excessive diversion of water by Respondents Robinsons and Gay and Robinson as aforesaid has deprived and prevented and is depriving and preventing Petitioner from receiving and taking from the Hanapepe River the amount of water it is entitled to receive and take under and by virtue of its rights to such water as is more particularly set forth hereinafter. Prior to said March 30, 1949, Petitioner pursuant to such rights took from the Hanapepe River and used for irrigation purposes water in the amount of not less than 11,000,000 gallons per day of constant flow as is illustrated for the period 1934-1948 on Exhibit A, said amount being established by reference to the duration discharge curve on Exhibit A entitled "McBryde Diversions, 1934-1948" and being measured and computed at ninety per cent (90%) of the time on said duration curve; subsequent to said March 30, 1949, and as a direct result of said excessive diversion of water by Respondents Robinsons and Gay and Robinson, Petitioner has been able to take from the Hanapepe River and use for irrigation purposes water only in the amount of not more than 4,000,000 gallons per day of constant flow as is illustrated for the period 1950-1958 on Exhibit A, said amount being established by reference to the duration discharge curve on Exhibit A entitled "McBryde Diversions, 1950-1958" and being measured and computed at ninety per cent (90%) of the time on said duration curve. Said excessive diversion of water by Respondents Robinsons and Gay and Robinson has also deprived and prevented and is depriving and preventing Petitioner from receiving and taking from the Hanapepe River the share of normal freshet and storm water that would but for such excessive diversion flow in the Hanapepe River through the Ilis Kupono of Eleele and Kuiloa and which Petitioner, as the owner of said ilis, is entitled to receive and take for irrigation purposes. Said excessive diversion of water is illegal and against the rights of Petitioner.

## IX

Respondents Robinsons and Gay and Robinson have threatened to, and Petitioner is informed and believes and upon such information and belief alleges that said Respondents intend and will continue to so illegally divert the waters of said Hanapepe River to the detriment and against the lawful rights of Petitioner, and may well in fact increase or attempt to increase the amount of excessive diversion of water hereinabove described in paragraphs VII and VIII to the further detriment and against the lawful rights of Petitioner. Unless said Respondents Robinsons and Gay and Robinson are restrained from so illegally taking and diverting the flow of said Hanapepe River, Petitioner will be deprived of the rights to which it is entitled as aforesaid to receive and take water in satisfaction of its rights as more particularly set forth hereinafter and in satisfaction of the rights in and to the normal freshet and storm flows of the Hanapepe River which Petitioner is entitled as the owners of the Ilis Kupono of Eleele and Kuiloa.

## X

The greater portion of the water illegally diverted by Respondents Robinsons and Gay and Robinson as above set forth, has been and is being conveyed and delivered to lands under control of Respondent, Olokele Sugar Company, Limited, at Makaweli pursuant to and under the terms and covenants of a certain lease made by and between Respondents Robinsons and Gay and Robinson and Respondent, Olokele Sugar Company, Limited, dated July 15, 1944 and recorded in the Bureau of Conveyances at Honolulu in Liber 1842, page 105, and by reason thereof said Olokele Sugar Company, Limited may have or may claim to have an interest in the controversy presented by this action.

Pursuant to the foregoing, and in accordance with Rule 8(e)(2) of the Hawaii Rules of Civil Procedure, Petitioner further respectfully presents and shows as follows:

## FIRST COUNT

For a First Count, Petitioner alleges as follows:

1. After the time of the Great Mahele in the year 1848, many of the lands in the lower Hanapepe Valley acquired and still have ancient appurtenant rights to receive, take and use water in a constant flow from the Hanapepe River.

2. a. Petitioner is the owner of 24.43 acres of land in the lower Hanapepe Valley having such appurtenant rights to take water from the Hanapepe River, the areas comprising said 24.43 acres being more particularly designated and shown as wet lands in the schedule hereto attached, marked Exhibit B, and by reference made a part hereof.

b. Of the lands comprising the Ilis Kupono of Eleele and Kuiloa, Petitioner is entitled to and owns similar appurtenant water rights in respect to a further aggregate area of 81.01 acres in the lower Hanapepe Valley, being 61.74 acres in the Ili of Eleele and 19.27 acres in the Ili of Kuiloa.

c. Petitioner is entitled to receive and take water from said Hanapepe River as the holder and owner of such appurtenant water rights in respect to a further aggregate area of 11.03 acres in the lower Hanapepe Valley, such rights having been reserved to Petitioner in a certain deed of lands made by Petitioner to Respondents Gay and Robinson, dated February 16, 1949, and recorded in said Bureau of Conveyances in Liber 2227, page 236. The areas in respect to which the water rights were and are so reserved to Petitioner are more particularly designated and shown as wet lands in Exhibit C attached hereto and by reference made a part hereof.

d. Petitioner owns such appurtenant water rights in respect to a further area of 0.32 acres in the lower Hanapepe Valley, such rights being appurtenant to a portion of L.C. Aw. 8254, Apana 2 (Tax Key 1912-7) and having been acquired by Petitioner from the owners thereof by deed dated May 31, 1935, and recorded in said Bureau of Conveyances in Liber 1295, page 15.

e. The right of Petitioner to take and use water from the Hanapepe River for the lands and on the basis of the appurtenant water rights in this paragraph 2 above enumerated and designated and aggregating 116.79 acres, is at a rate of not less than 85,000 gallons per acre per day of constant flow (as was alleged in the Cross-Bill of Complaint of Petitioner in the case of *Territory of Hawaii, et al. vs. Francis Gay, et al.*, Equity No. 2856, in the Circuit Court of the First Judicial Circuit, said Territory), and that the aggregate amount of water which Petitioner is so entitled to receive and take from the Hanapepe River for the lands and rights in this paragraph 2 above mentioned and referred to is not less than 9,927,150 gallons per day of constant flow (116.79 × 85,000 = 9,927,150).

3. In addition to the right to receive and take water from the Hanapepe River in the amount of at least 9,927,150 gallons per day as is set forth in paragraph 2 above, Petitioner, for the lands and on the basis of the appurtenant water rights as set forth in said paragraph 2, is entitled to receive, take and use not less than 1,000,000 gallons per day of constant flow from the said Hanapepe River, representing the amount of so-called "circulating waters" to

which said lands were and are entitled by virtue of their aforesaid appurtenant water rights.

4. By virtue of the foregoing, the aggregate amount of water which Petitioner is entitled to receive and take from the Hanapepe River for the lands and rights in this First Count above mentioned and referred to is not less than 11,000,000 gallons per day of constant flow (9,927,150 + 1,000,000 = 10,927,150, rounded out to 11,000,000).

## SECOND COUNT

For a Second Count, Petitioner alleges as follows:

1. As already alleged, after the time of the Great Mahele in the year 1848, many of the lands in the Hanapepe Valley acquired and still have ancient appurtenant rights to receive, take and use water in a constant flow from the Hanapepe River. At or about the time of the Great Mahele, said lands fully utilized and were entitled to the use of all of the constant flow from the Hanapepe River, the amount of water flowing in and through the said Hanapepe River in its course through the said Hanapepe Valley being not less than 32,000,000 gallons per day of constant flow.

2. Petitioner, as alleged in paragraph 2 of the First Count of this Amended Complaint, is the owner of ancient appurtenant rights to water in respect to an aggregate of 116.79 acres of the lands referred to in paragraph 1 of this Second Count. As further alleged in said First Count, the aggregate amount of water which Petitioner is entitled to receive and take from the Hanapepe River for such lands and rights is not less than 11,000,000 gallons per day of constant flow.

3. The Respondents Robinsons and Gay and Robinson are the owners of certain lands within said lower Hanapepe Valley and may be entitled to water from the Hanapepe River by virtue of water rights appurtenant to said lands similar to the rights of Petitioner as hereinabove set forth in the First Count of this Amended Complaint. The aggregate area of such lands held and owned by said Respond-

ents in said Hanapepe Valley is 30.79 acres, said areas within the lower Hanapepe Valley being more particularly designated and shown as wet lands in the schedule hereto attached, marked Exhibit D, and by reference made a part hereof.

4. The Respondents named in the second paragraph of paragraph II of this Amended Complaint are the owners of certain lands within said lower Hanapepe Valley and may be entitled to water from the Hanapepe River by virtue of water rights appurtenant to said lands similar to the rights of Petitioner as hereinabove set forth in the First Count of this Amended Complaint. The aggregate area of such lands held and owned by said Respondents in said lower Hanapepe Valley is 31.62 acres, said areas being more particularly designated and shown as wet lands in the schedule hereto attached, marked Exhibit E, and by reference made a part hereof.

5. The State of Hawaii may be the owner of similar ancient water rights appurtenant to 142.97 acres of land in the lower Hanapepe Valley.

6. By virtue of the foregoing, the Respondents herein named and referred to in paragraphs 3, 4 and 5 of this Second Count may have the right to take and use water from said Hanapepe River by virtue of water rights appurtenant to an aggregate of 205.38 acres. If the right of said Respondents to take and use said water, and on the basis of said appurtenant water rights above enumerated and designated, if any, is at a rate of not less than 85,000 gallons per day of constant flow, the aggregate amount of water which said Respondents may be so entitled to receive and take from the Hanapepe River for the lands and rights in this Second Count above mentioned and referred to is not less than 17,457,300 gallons per day of constant flow (205.38 × 85,000 = 17,457,300).

7. The balance of the constant flow of said Hanapepe River, being 3,542,700 gallons per day (32,000,000 — (11,000,000 + 17,457,300) = 3,542,700), represents the appurtenant water rights, if any, of the lands of Respondents

in this Second Count above mentioned and referred to with respect to so-called "circulating waters" and the appurtenant water rights, if any, of wet lands within the Ilis of Koula and Manuahi where the rainfall is heaviest and the water duty is lower than in the lower Hanapepe Valley.

8. By virtue of the foregoing, the aggregate amount of water which Petitioner is entitled to receive and take from the Hanapepe River for the lands and rights in this Second Count above mentioned and referred to is not less than 11,000,000 gallons per day of constant flow.

## THIRD COUNT

For a Third Count, Petitioner alleges as follows:

1. For a period of more than ten years preceding the diversion of water by Respondents Robinsons and Gay and Robinson as in paragraph VII herein set forth, Petitioner actually, openly, notoriously, exclusively, continually, adversely and hostilely and under claim of right took from the Hanapepe River and used for irrigation purposes water in the amount of not less than 11,000,000 gallons per day of constant flow as is illustrated for the period 1934-1948 on Exhibit A, said amount being established by reference to the duration discharge curve on Exhibit A entitled "McBryde Diversions, 1934-1948" and being measured and computed at ninety per cent (90%) of the time on said duration curve.

2. By virtue of the foregoing, the aggregate amount of water which Petitioner is entitled to receive and take from the Hanapepe River for the water rights in this Third Count above mentioned and referred to is not less than 11,000,000 gallons per day of constant flow.

## FOURTH COUNT

For a Fourth Count, Petitioner alleges as follows:

1. Prior to the diversion of water by Respondents Robinsons and Gay and Robinson as in paragraph VII herein

set forth, certain of the lands in the Hanapepe Valley and lands within the Ahupuaa of Hanapepe adjacent to and adjoining said Hanapepe Valley acquired and still have vested riparian rights to receive, take and use water in a constant flow from the Hanapepe Valley.

2. Petitioner, as the owner of the lands in said Hanapepe Valley enumerated and designated in paragraphs 2a and b of the First Count of this Amended Complaint, and as the holder and owner of the water rights to the lands enumerated and designated in paragraphs 2c and d of said First Count, and as the owner of certain lands within the Ahupuaa of Hanapepe adjacent to and adjoining said Hanapepe Valley, has acquired and still has vested riparian rights appurtenant to said lands to take and use water from the Hanapepe River for the lands mentioned in this paragraph in the amount of not less than 11,000,000 per day of constant flow.

3. Prior to the diversion of water by Respondents Robinsons and Gay and Robinson as in paragraph VII herein set forth, Petitioner in the exercise of said vested riparian rights took from the Hanapepe River and used for irrigation purposes on the lands mentioned in paragraph 2 above, water in the amount of not less than 11,000,000 gallons per day of constant flow, as is illustrated for the period 1934-1948 on Exhibit A, said amount being established by reference to the Duration discharge curve on Exhibit A entitled "McBryde Diversions, 1934-1948" and being measured and computed at ninety per cent (90%) of the time on said duration curve.

4. The Respondents herein named may have similar vested riparian rights with respect to the lands enumerated and designated in paragraphs 3, 4 and 5 of the Second Count of this Amended Complaint and other lands within the Ahupuaa of Hanapepe. The exercise by Petitioner of its vested riparian rights as set forth in paragraph 3 above is without detriment to any vested riparian rights, if any, of said Respondents since the total of Petitioner's vested riparian rights to water set forth in this Fourth Count

and the said vested riparian rights to water of the Respondents, if any, does not exceed the amount of water flowing in and through or that should flow in and through the said Hanapepe River in its course through the said Hanapepe River in its course through the said Hanapepe Valley, as alleged in paragraph IV of this Amended Complaint. No other persons have acquired or have similar vested riparian rights to water from the said Hanapepe River.

5. By virtue of the foregoing, the aggregate amount of water which Petitioner is entitled to receive and take from the Hanapepe River for the lands and rights in this Fourth Count above mentioned and referred to is not less than 11,000,000 gallons per day of constant flow.

WHEREFORE, PETITIONER PRAYS:

1. That process issued out of this Honorable Court citing the Respondents above named to appear herein and answer this Amended Complaint and to present their respective claims respecting the issues raised by this Amended Complaint;

2. That after the hearing hereof, it be adjudged that Petitioner is the owner of ancient appurtenant rights, riparian rights and/or prescriptive rights entitling it to receive, take and use a constant flow of not less than 11,000,000 gallons of water per day from the said Hanapepe River;

3. That the rights of Petitioner in the normal freshet and storm waters of the Hanapepe River originating and having source in the Ilis of Koula and Manuahi be determined and settled;

4. That the diversion of water from the Hanapepe River by Respondents Robinsons and Gay and Robinson to the extent that such diversion deprives Petitioner of the rights to water from the Hanapepe River to which it is entitled, both as to normal and normal freshet or storm flow, be adjudged wrongful and illegal and that said Respondents

be ordered to desist from and discontinue such illegal diversion;

5. That notice of the hearing hereof be given to those Respondents who cannot be found by publication or posting in such form as to this Honorable Court may be deemed most efficient and as is provided by law;

6. And for such other and further relief as Petitioner may be entitled to in the premises and as shall be just and equitable between the parties.

DATED at Honolulu, Hawaii, this 22nd day of April, 1960.

C. NILS TAVARES
C. Nils Tavares
Alexander & Baldwin Bldg.
Honolulu, Hawaii

GILBERT E. COX
Gilbert E. Cox
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Of Counsel:

PRATT & TAVARES
SMITH, WILD, BEEBE & CADES

[Exhibits Deleted in Printing]

## APPENDIX R

## ANSWER BY DEFENDANT STATE OF HAWAII, FILED IN THE CIRCUIT COURT MAY 25, 1960

S. P. NO. 108

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

**Action to Determine
Water Rights**

AT CHAMBERS

McBRYDE SUGAR COMPANY, LIMITED,
*Petitioner,*

v.

ALICE ROBINSON *ET AL.*
*Respondents.*

### ANSWER TO AMENDED COMPLAINT

[Filed May 25, 1960]

TO THE HONORABLE, THE PRESIDING JUDGE SITTING AT CHAMBERS, to Hear and Determine Controversies Respecting Rights of Private Ways and Water Rights:

Respondent, STATE OF HAWAII, by way of answer to the amended complaint filed herein, states as follows:

### I

Respondent admits the allegations contained in paragraphs I, V and the first paragraph of paragraph IV.

II

Respondent is without knowledge or information sufficient to form a belief as to the truth of all the other allegations found in heretofore mentioned complaint.

WHEREFORE, RESPONDENT PRAYS that a hearing be held for a determination of the respective rights of all parties to the waters of Hanapepe River, on the Island of Kauai.

DATED: Honolulu, Hawaii, May 24, 1960.

STATE OF HAWAII

By /s/ Henry H. Shigekane
Henry H. Shigekane
Deputy Attorney General

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

/s/ Yoshio Ishii

Clerk, Circuit Court, Fifth Circuit,
State of Hawaii

# APPENDIX S

## McBRYDE SUGAR CO., LTD., OPENING POST-TRIAL BRIEF, FILED IN THE CIRCUIT COURT SEPTEMBER 20, 1965 (EXCERPTS)

S. P. 108

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

**Action to Determine**
**Water Rights**

AT CHAMBERS

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff*,

vs.

AYLMER F. ROBINSON, *et al.*,
*Defendants.*

## IV. PLAINTIFF'S OPENING BRIEF

[Filed September 20, 1965]

### A. Preliminary Statement

In prior litigation[1] (in which McBryde was not a party) it was judicially determined that G & R were the owners of the sources of the Hanapepe stream; that after at all times satisfying the primary water rights of lower owners in the valley, either ancient appurtenant or prescriptive, G & R were the owners of the normal daily surplus waters; and that as to storm and freshet surplus waters, such waters must be divided between the konohiki owners[2] in accordance with the common law system of riparian rights.

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[1] Described in detail in Appendix A.

[2] This shorthand phrase is used to designate owners of the ahupuaa and the ilis kupono which are equal in rank in all respects.

There has never been a judicial determination of the quantities of water to which the lower owners in Hanapepe having primary water rights are entitled and hence there has been no judicial determination of what constitutes the normal daily surplus waters or the storm and freshet surplus waters of Hanapepe. The instant litigation will result in a final quantitative determination of the amounts of water which are required to satisfy the ancient appurtenant and prescriptive rights of the lower owners (including, to the extent of their wet lands in Hanapepe, G & R). It will then be possible to determine quantitatively what amount of water G & R is at liberty to divert to themselves in their capacity as owners of the normal daily surplus waters of the river and constituting their ownership of waters ascertained in accordance with Hawaiian law. While McBryde is the plaintiff in this case and has initiated the proceeding, it is the court's duty as commissioner to order the division of the waters in accordance with vested rights and as shall be just and equitable between the parties.

This brief will deal with the rules of ownership that have crystallized out of the numerous decisions in Hawaii. It will be demonstrated that the ownership of the normal surplus water and the division required of the storm and freshet surplus water results from the combination of "ancient Hawaiian custom" and the common law of riparian rights as pointed out in *Carter v. Territory*, 24 Haw. 47 (1917), case and reaffirmed in *Territory v. Gay*, 31 Haw. 376 (1930). At any period of time, before G & R will be entitled to divert water by reason of a claim that it is normal daily surplus water (referred to by Robertson, C.J. in the *Carter* case as the "last right")[1] the vested rights of lower owners (referred to as the "primary rights") must be justly and equitably satisfied.

---

[1] "And the Territory could not convert the last right into a first right by taking the water out at a point far above to the detriment of the petitioner" (24 Haw. 47 a 62) or to paraphrase it, " G & R cannot convert the last right (*i.e.*, to normal daily surplus) into a first right by taking the water out at a point far above to the detriment of McBryde.

### B. Right to Water Through Ownership of Lands Entitled to Water.

As a consequence of the Hawaiian method of measuring water rights, it is necessary for the court, as commissioner, to decide from the best information now available where the ancient auwais were, where the ancient taro lands were located and to what amount of water the lands had become entitled by usage by the ancient Hawaiians in accordance with ancient custom.[1]

The Hawaiian scheme of water rights was highly practical and easily administered in the years immediately following the division of the lands, or mahele, of Kamehameha III in 1848, since the amount of taro lands, their location, and the amount of water used thereon were well known to all the people in the vicinity. However, with the passage of time, the facts and direct evidence of ancient taro culture have become more and more difficult to prove. Thus, the court is presented with the necessity of recreating from the evidence the probabilities as to location of the lands that were taro lands from time immemorial,[2] how they were cultivated from time immemorial and the amount of water used in such cultivation.

As the Supreme Court of this State has consistently held, lands that were entitled to water by immemorial usage, upon passage into private ownership, had joined to them an appurtenant right to the amount of water which they had been entitled to use by immemorial usage. Conveyances of such land, unless the water rights were reserved, included all the water which the lands had enjoyed from

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[1] In the next section we will consider the cases governing the question of as of what time ancient appurtenant rights accrued and under what limited conditions rights to water by ancient custom did not pass with the award of the land.

[2] The valley has been flooded from time to time and many of the ancient land marks obliterated, see Ex. M-F-14(b), where, in 1871, V. Knudsen describes how the great flood of 1856-1859 swept a great part of the fine kalo land of Eleele to the sea.

time immemorial. *Peck v. Bailey*, 8 Haw. 645 (1867); *Wailuku Sugar Co. v. Widemann*, 6 Haw. 185 (1876); *Haw'n. Com. & S. Co. v. Wailuku S. Co.*, 15 Haw. 675 (1904); *Carter v. Territory*, 24 Haw. 47 (1917); *Territory v. Gay*, 31 Haw. 376 (1930).

[Material Deleted in Printing]

(b) *G & R's Contention That The Waters Diverted By McBryde Were Not Under The Control Or Ownership Of G & R But By Lease Agreement Were Under The Control Of H. S. Co. Is Fallacious—The Waters Taken By McBryde Under Claim Of Right Were Those Claimed To Be Owned By G & R.*

McBryde's theory of prescription is based upon the principle, peculiar to Hawaiian law, that the normal surplus waters in a stream are owned absolutely by the konohiki of the upper ilis kupono where, as here, those ilis kupono are the source of the waters flowing in the stream.[1]

G & R's ownership of the normal surplus waters involves more than merely a right to use the waters for the limited purposes contemplated under the common law doctrine of riparian rights. Under the Hawaiian law, ownership of water includes the right to use the water for any purpose, the right to waste the water, and the right to prevent others from using the water.[2]

[Material Deleted in Printing]

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[1] *Territory v. Gay*, 31 Haw. 376 (1930), and other cases cited, *supra*.

[2] (The principle is well set out in *Kaneohe Ranch Co. v. Kaneohe Rice Mill Co.*, Eq. 1710, First Circuit, (Ex. M-J-11), where the konohiki was held to have the right to enjoin the downstream user of water from using more water than his ancient rights entitled him to, despite the fact that there was more water available than needed, and waters were running waste to the sea.)

# APPENDIX T

## BRIEF ON BEHALF OF SELWYN A. ROBINSON, ET AL., IN NO. 4879, OCTOBER TERM 1969, FILED IN THE SUPREME COURT OF HAWAII DECEMBER 29, 1969 (EXCERPTS)

**No. 4879**

IN THE SUPREME COURT OF THE
STATE OF HAWAII

October Term, 1969

**Special Proceeding No. 108**

McBryde Sugar Company, Limited,
*Plaintiff-Appellant, Cross-Appellee,*
vs.

Aylmer F. Robinson, *et al.,*
*Defendants-Appellees, Cross-Appellants.*

[Filed December 29, 1969]

**BRIEF ON BEHALF OF**
**SELWYN A. ROBINSON, et al., APPELLANTS**

Appeal from Final Judgment Dated January 30, 1969

Fifth Circuit Court

Honorable Benjamin M. Tashiro, Judge

J. Garner Anthony 111-0,
John H. R. Plews 583-0,
Ninth Floor, 333 Queen Street,
Honolulu, Hawaii,
*Attorneys for Selwyn A. Robinson, et al., Appellants.*

Anthony & Waddoups,
Ninth Floor, 333 Queen Street,
Honolulu, Hawaii,
*Of Counsel.*

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| 1847 | Principles of Land Commission, L. 1847, p. 81; RLH 1925, Vol. II, p. 2124. |
| 1848 | Great Mahele, Estate of Kamehameha IV, 2 Hawaii 715, 722 (1864). |
| 1850 | Enactment of Further Principles of Land Commission, L. 1850; RLH 1925, Vol. II, p. 2141. |
| 1851<br>1855 | LCA awards of Hanapepe lands. |
| 1853 | Land Commission extended to December 30, 1854, L. 1854, p. 416; RLH 1925, Vol. II, p. 2147. |
| 1867 | Government lease of Hanapepe to Elizabeth Sinclair for 10 years (G&R B-6). |
| 1867 | Lease kula land of Helekalaula, Hanapepe, Elizabeth Sinclair to Ahu (G&R B-1b). |
| 1875 | Lease Helekalaula, Elizabeth Sinclair to Chulan and Co. (G&R B-2). |
| 1877 | Renewal Government lease of Hanapepe to Elizabeth Sinclair for 10 years (G&R B-7). |
| 1887 | Government lease of ahupuaa Hanapepe to Elizabeth Sinclair, term 30 years (G&R B-11). |
| 1889 | Hawaiian Sugar Co. lease executed October 29, 1889, Elizabeth Sinclair et al. to W. R. Watson (G&R M-1); assigned November 4, 1889 to Hawaiian Sugar Co. (G&R M-3). |
| 1891 | Hawaiian Sugar Co.'s dams, ditches and flumes completed (Finding 13, Judge Cristry, M-J-6, p. 52). |
| 1910 | Joint executive control of McBryde and Hawaiian Sugar Co. established. |

## Chronology (Cont.)

| | |
|---|---|
| 1918 | Government lease of Hanapepe to G&R expired. |
| 1919-22 | *Territory v. Gay*, 26 Hawaii 382, held G&R had title to Koula. |
| 1927<br>Jun 1 | G&R served petition for perpetuation on Territory and McBryde (S.P. 23, 5th Cir.). |
| 1927<br>Jul 7-16 | Kamaaina testimony taken in S.P. 23. |
| 1927<br>Aug. 15 | *Territory v. Gay, Hawaiian Sugar Co., McBryde, et al.*, Equity 2856, filed. |
| 1927<br>Sep 30 | McBryde filed answer and cross bill in Equity 2856. |
| 1927 | Ewart tests. |
| 1928-31 | McCombs tests. |
| 1928<br>Feb 25 | Cristy, J. dismissed amended complaint and McBryde's cross bill in Equity 2911. |
| 1928<br>Apr 13 | Territory filed amended complaint, Equity 2856. |
| 1928 | Territory filed *Territory v. G&R & Hawaiian Sugar Co.*, Equity 2911. |
| 1929<br>Jun 13-22 | Trial on merits, Equity 2911. |
| 1929<br>Aug 14 | Decision of Cristy, J., Equity 2911. |
| 1930<br>Apr 28 | Decision, Supreme Court in *Territory v. Gay*, 31 Hawaii 376. |
| 1930-31 | McBryde-Territory experiment. |
| 1931<br>Aug 29 | *Territory v. Gay*, 52 F2d 356 affirmed, cert. denied 284 U.S. 677. |

## Chronology (Cont.)

| | |
|---|---|
| 1932<br>Aug 25 | *Territory v. Gay, Hawaiian Sugar Co., McBryde Sugar Co., et al.*, Equity 2856, decree of Cristy, J., affirmed 32 Hawaii 404. |
| 1937 | Hawaiian Sugar Co. lease extended to December 31, 1940. |
| 1939 | Hawaiian Sugar Co. lease extended to December 31, 1941. |
| 1941 | Declaratory judgment—*Hawaiian Sugar Co. v. G&R,* Law 1722, 5th Cir. |
| 1941 | Olokele purchased lease and mill from Hawaiian Sugar Co. (G&R B-4). |
| 1942<br>Mar 25 | *McBryde Sugar Co. v. Aarona,* Equity 109 (5th Cir.) duty of water, 30,000 gpd. |
| 1949 | G&R tunnel opened. |
| 1959<br>Mar 24 | Complaint filed. |
| 1960<br>Apr 22 | Amended complaint served. |
| 1965<br>May 5-<br>Aug 17 | Trial |
| 1968<br>Dec 10 | Decision of Judge Tashiro. |
| 1969<br>Jan 30 | Amendments to decision. |
| " | Amended judgment entered. |
| Feb 28 | Notice of appeal by Selwyn A. Robinson, et al. (R. 273-274). |
| " | Notice of appeal by McBryde Sugar Co. (R. 279-281). |
| " | Notice of appeal by State of Hawaii (R. 282-283). |

No. 4879

# IN THE SUPREME COURT OF THE STATE OF HAWAII

October Term, 1969

**Special Proceeding No. 108**

McBryde Sugar Company, Limited,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

Aylmer F. Robinson, *et al.*,
*Defendants-Appellees, Cross-Appellants*

## BRIEF ON BEHALF OF SELWYN A. ROBINSON, et al., APPELLANTS

Appeal from Final Judgment Dated January 30, 1969
Fifth Circuit Court

Honorable Benjamin M. Tashiro, Judge

## INTRODUCTION

We have over 50 reported cases on water rights. This is the first important one since 1932, hence a brief survey of our unique system is in order. As Chief Justice Perry said, it is "based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water" *Territory v. Gay*, 31 Hawaii 376, 395 (1930). It has been accurately described in Hutchins, *The Hawaiian System of Water Rights*[1] (1946).

In general, our system awards to the owners of particular lands definite quantities of water, without restriction on use. It has thus encouraged expenditures to develop water resources. This is in sharp contrast to the "riparian doctrine" which has discouraged irrigation by making water rights indefinite and restrictive. *Territory v. Gay,* 31 Hawaii 376, 396-401 (1930); Hutchins, *op cit.*

---

[1] This text is a carefully written description of our system of water rights with citations to reported cases. It also describes our land titles and units such as ahupuaas, ilis kupono and kuleanas (pp. 39-46) which is essential to an understanding of the system.

In Hawaii water rights are classified as:

a) *"Appurtenant water."* An award of land by Land Commission, or a grant of land by the Crown included the right to the quantity of water that was used on the parcel awarded or granted "at and immediately before the date of the grant" *Carter v. Territory,* 24 Hawaii 47, 64 (1917); *Territory v. Gay, supra,* p. 383; Hutchins, *op. cit.* 102-110.[1a]

b) *"Surplus water."* Is all the water remaining after appurtenant rights are satisfied which belongs to the konohiki of the ahupuaa or ili kupono. *Territory v. Gay, supra,* pp. 384-5; *HC&S Co. v. Wailuku S. Co.,* 15 Hawaii 675, 680-681 (1904); Hutchins, *op. cit.* 69-78.

While both types of rights have their origin as the right of a particular parcel of land, the owner is in general free to use the water elsewhere. *Peck v. Bailey,* 8 Hawaii 658, [illegible], 673 (1867); *Carter v. Territory,* 24 Hawaii 47, 69 (1917).

Water rights may be acquired by prescription. However, since the konohiki's surplus water included all water of a stream which did not belong to someone by appurtenant right, appurtenant and surplus rights covered *all* water. Prescription cannot run against the sovereign, and thus cannot be the original source of title. Therefore, prescriptive rights are not a separate class of rights; instead, prescription is a way in which one person can acquire rights which formerly belonged to another private individual by appurtenant or surplus rights. The use of water on land not previously entitled to water is not alone sufficient to establish a prescriptive right, since it might simply be water which the owner has "transferred" from other lands owned by him which have water rights. To establish prescriptive rights, the owner must show that his total diversions have exceeded what he was lawfully entitled to divert. *HC&S Co. v. Wailuku S. Co.*, 15 Hawaii 675, 686 (1904).

---

[1a] Early cases often misleadingly named such rights "prescriptive." Later, "appurtenant" was adopted to avoid confusion with ownership based on true prescription. *Territory v. Gay, supra,* pp. 383-4; Hutchins, *op cit.,* 108-110.

## QUESTIONS PRESENTED

1. Did McBryde, by taking water belonging to the State and other lower owners, for a 10-year period acquire a prescriptive right to take the water which G&R was entitled to and in fact continued to take during the 10-year period?

2. Did the circuit judge err in enjoining G&R from diverting an unascertained quantity of water contrary to HRCP 65(d)?

3. Did the circuit judge err by making a double allowance for ditch losses allowing each owner of appurtenant water rights to take 50,050 gpapd (gallons per acre per day) measured at any point *along or at the end of the ditches,* as well as at the point the ditches divert water from the river, when the court had already increased the rights of these owners 15% to allow for the losses in ditches in arriving at the figure of 50,050 gpapd?

[Material Deleted in Printing]

# APPENDIX U

## OPENING BRIEF OF McBRYDE SUGAR CO., IN NO. 4879, FILED IN THE SUPREME COURT OF HAWAII DECEMBER 29, 1969 (EXCERPTS)

No. 4879

IN THE SUPREME COURT OF THE
STATE OF HAWAII
OCTOBER TERM 1969

SPECIAL PROCEEDING NO. 108

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, *et al.,*
*Defendants-Appellees, Cross-Appellants.*

APPEAL FROM FINAL JUDGMENT
DATED JANUARY 30, 1969
FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, Judge

**OPENING BRIEF OF**
**McBRYDE SUGAR COMPANY, LIMITED**

[Filed December 29, 1969]

J. RUSSELL CADES (133-0)
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## I STATEMENT OF JURISDICTION

This case was commenced before the Judge of the Fifth Circuit Court, sitting as Commissioner of Private Ways and Water Rights pursuant to Chapter 664, Part III, Hawaii Revised Statutes. That court filed its decision on December 10, 1968, and judgment thereon was entered on January 17, 1969. Upon motions for amendment of the decision and judgment the court filed Amendments to Decision and filed an Amended Judgment on January 30, 1969. Notices of Appeal were timely filed by Aylmer F. Robinson, et al. ("G&R"), the State of Hawaii ("State"), and McBryde Sugar Company, Limited ("McBryde") on February 28, 1969.

## II QUESTIONS PRESENTED

1. Under Hawaiian law, what is the standard for determining lands entitled to ancient appurtenant water rights?

2. Can lands used for taro cultivation from time immemorial be denied an ancient appurtenant water right because they were not actually under taro cultivation on the date of the Land Commission Award, where there has been no proof of abandonment of the immemorial right and no proof of prescriptive use of those waters by others?

3. What lands, in addition to those found by the trial court to have ancient appurtenant water rights, are entitled to such a water right and, conversely, what lands held by the trial court to be entitled to ancient appurtenant rights are not so entitled?

4. What is the proper measure of the water duty of lands having ancient appurtenant rights in this case?

5. Is it proper to reduce the water duty of each acre of taro land found by the trial court to have an ancient appurtenant water right based upon usage of such lands for the cultivation of taro at the time of the Land Commission Awards by one-third to allow for either: (a) the fact that other lands, watered by Hawaiian custom from

e immemorial, were not actually in cultivation (that is,
re fallow) at the time of the Land Commission Awards;
(b) for the fact that, in the opinion of the trial court,
least one-third of the very lands the trial court had held
re entitled to an ancient appurtenant water right were
all times lying fallow at the time of the Land Commis-
n Awards (probably because of the decline in population
that time)?

Are prescriptive water rights to the flow of a stream
e measured only as of the driest five days in the whole
teen-year three-month prescriptive period, or are such
ts to be measured in normal dry weather flow condi-
s, and also at other flow conditions of the stream, based
n the actual proof of prescriptive usage at various
r flow stages over the entire prescriptive period?

What additional prescriptive water rights of McBryde
ld be awarded at each flow stage of the Hanapepe
r?

Were certain of the water flow, diversion, and measure-
figures adopted by the trial court erroneous?

Did the trial court err in refusing to follow the rule
rter *v. Territory*, 24 Haw. 47 (1917) regarding the
ts of owners of ahupuaas or ilis kupono along a stream
re in the storm and freshet waters of the stream
ant to the doctrine of riparian rights and in refusing
ward McBryde its riparian rights in the storm and
t waters of Hanapepe stream?

Under the record in this case, what is the dividing
between the normal daily surplus flow of the stream
ed by G&R) and the storm and freshet surplus flow
e stream (to be shared by G&R, the State and Mc-
e)?

If this court decides to overrule *Carter v. Territory*,
rule of law should be established for surplus waters?

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# APPENDIX V

## ANSWERING BRIEF ON BEHALF OF SELWYN A. ROBINSON, ET AL., IN NO. 4879, FILED IN THE SUPREME COURT OF HAWAII JUNE 1, 1970 (EXCERPTS)

No. 4879

IN THE SUPREME COURT OF THE
STATE OF HAWAII
OCTOBER TERM 1969

Special Proceeding No. 108

McBryde Sugar Company, Limited,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

Aylmer F. Robinson, *et al.,*
*Defendants-Appellees, Cross-Appellants,*

**ANSWERING BRIEF ON BEHALF OF SELWYN A. ROBINSON, et al., APPELLANTS**

Appeal from Final Judgment dated January 30, 1969
Fifth Circuit Court

Honorable Benjamin M. Tashiro, Judge

[Filed June 1, 1970]

### QUESTIONS PRESENTED

The questions presented by our opening brief are stated at pages 3-4 thereof. The questions of law raised by the State's and McBryde's opening briefs are:

1. Is the quantity of water to which land awarded by the Land Commission or granted by the King is entitled as an easement implied in the award or grant determined

the quantity which was customarily used on that land and immediately before the date of the award or grant?

2. Does the Hawaiian rule that the konohiki who owns e water source may use the surplus waters remaining er all the appurtenant and prescriptive rights of others satisfied apply to "storm and freshet" surplus as well "normal" surplus; or should "storm and freshet" surs be distinguished from "normal" surplus and shared ith other konohikis according to the riparian rules of Eastern United States, or the prior appropriation rules the Western States?

How does one determine the difference between rm and freshet" and "normal surplus"?

May a party who without objection introduces in ence a decision in an earlier case to which he was not rty, object on appeal that the trial court based its ing on that evidence?

May McBryde acquire an adverse or prescriptive right st G&R by taking water belonging to the State and lower owners?

[Material Deleted in Printing]

## II

## APPURTENANT WATER RIGHT IS TO THAT QUANTITY OF WATER CUSTOMARILY USED ON THE PARCEL AT AND IMMEDIATELY BEFORE THE TIME OF THE LAND COMMISSION AWARD OR GRANT

e trial court held:

### *Appurtenant Water Rights*

1. When land was awarded by the Land Commission or granted by the King or government, the award or grant included the right to water in the quantity which

was customarily used on the land at and immediately before the date of the award or grant.

*Carter v. Territory*, 24 Haw. 47, at page 64:

> . . . Like the rights which passed to lands awarded by the land commission, it was a right to such quantity of water as was customarily used on the land at and immediately before the date of the grant so long as that quantity continued to be available. . . .

*See also: Territory v. Gay*, 31 Haw. 376, at page 383:

> . . . Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, the land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named. . . .

Hutchins, *The Hawaiian System of Water Rights*, pp. 104-106 (Conclusion of Law No. 1; Appendix 67-68).

There is no inconsistency between these decisions and earlier cases such as:

*Peck v. Bailey*, 8 Hawaii 658 (1867):

> The same principle applies to all lands conveyed by the King, or awarded by the Land Commission. If any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance. (p. 661)
>
> . . . .
>
> This includes the water courses on their lands, and all the water which the lands had enjoyed *from* time immemorial. (p. 662; emphasis supplied).

*Mele v. Ahuna*, 6 Hawaii 346 (1882):

> . . . it is presumable that the taro patches had had water *from* ancient times. (6 Hawaii 349; emphasis supplied)

*Lee Chit Sam v. Wong Kim*, 5 Hawaii 130 (1884):

> . . . certain lands are entitled to the water they have enjoyed by ancient custom. . . . (5 Hawaii 132)

*Davis v. Afong*, 5 Hawaii 216 (1884):

> We say the defendant is to have water sufficient to cultivate his land in kalo because this is the gauge of the amount of water used by this land *from* ancient times. . . . (5 Hawaii 224; emphasis supplied)

*Ing Choi v. Ung Sing & Co.*, 8 Hawaii 498 (1892):

> Plaintiff's land . . . has received its water for an indefinite time. The evidence is convincing that this acquisition and use of the water from the patches of the land above is an ancient right. (8 Hawaii 498)

othing in any of these cases awards water to lands h had used water in ancient times, but had ceased to sed before the award of the Land Commission or conance by the King.

ief Justice Allen's use in *Peck v. Bailey*, 8 Hawaii 658 ) of phrases "immemorial usage" and "time im- orial" should not cause any confusion. While these s have tended to disappear from the legal style book, had a clear and well-defined meaning.

25 CJS *Customs & Usages* § 3:

> The general rule is that a common-law custom must have existed from time immemorial, or, in other words, so long that the memory of man runneth not to the contrary.

Black's *Law Dictionary* 1653 (1957 ed.):

> *Time immemorial.* Time whereof the memory of a man is not to the contrary.

2 Bouvier's *Law Dictionary* 1494 (1914 ed.):

> *Immemorial usage.* Prescription; custom which has existed so long that the memory of man runneth not to the contrary.

"Immemorial usage" of water means that as far as anyone could remember, or any record showed, water had always been used on the land. *Peck v. Bailey* holds that when such land was awarded or granted, the customary usage turned into a right.

*Carter v. Territory,* 24 Hawaii 47 (1917) followed this rule. One parcel (Lihue) was granted on July 11, 1853. Prior to the grant, water had been used to irrigate sugar on it but this use ceased before the grant (24 Hawaii 62-66). This Court held that the land was not entitled to water which was used to grow sugar, but only,

> as we have said, of such quantity as was used at and immediately before the date of the grant. (24 Hawaii 66)

This holding is consistent with *Peck v. Bailey*. Irrigation to grow cane was not "immemorial," because people remembered that for four years before the grant, water had not been used. Thus it had not always been used, and the memory of man did "run to the contrary."

McBryde (Brief, p. 20) cites *Horner v. Kumuliilii,* 10 Hawaii 174 (1895). In that case, this Court enforced an "eleven day" system of water division adopted around 1845.

> . . . we remark that though the water of this water course was undoubtedly divided by some method or other in ancient times, the method of division of the water now sought to be enforced by the plaintiffs is hardly fifty years old, and being the result of the planning of several leading 'konohikis' or head men under the chiefs or other persons (the land owners) assisted by the governor of the island. . . . (10 Hawaii 178)

s the decision was dated 1895, the system advocated plaintiff and enforced by this Court originated about 5, the year the Land Commission was appointed. It was immemorial, but it was enforced, rather than the way water was distributed "by some method or other in ent times."

cBryde (Brief, p. 20) cites *Kohala Sugar Co. v. Wight,* Hawaii 644 (1899).

Kohala Sugar Co. owned Halaula. Dr. Wight owned lawa, on which there was a spring called Kapunaokane. re was evidence that Kamehameha I had built a ditch arry water from the Kapunaokane spring to a place d Keawaeli on Halaula, but the ditch soon stopped g used. In 1867, Kohala's manager reopened the ditch. 1897, Kohala sued to enjoin Dr. Wight from interfering the ditch. This Court held that—

> . . . it does not seem to us that the fact that Kamehameha using Halawa water on Halaula was an adverse use in favor of Halaula as a dominant estate. He owned both lands and until Halaula and Halawa had separate owners, no adverse use of the water could be in favor of one land against the other. (11 Hawaii 648)

is points up the flaw in McBryde's argument (Brief, 19-24) about the abandonment of "immemorial rights." e were immemorial customs and usages, but there e no *rights* in land or water until they were created by d Commission awards, patents or grants. Until then, land and all water belonged to the king alone. Kameha- a I did not own just Halaula and Halawa.

### *CONSTITUTION OF 1840*

> *KAMEHAMEHA I*, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other. * * *

Until the Declaration of Rights of 1839, nobody except the king had any right in land or water.

Hutchins, *The Hawaiian System of Water Rights*, 21:

> All landholders except the king were therefore merely tenants at sufferance.

1 Kuykendall, *The Hawaiian Kingdom*, 269:

> All land, save that of the king, was held by a revocable tenure and dispossession was in fact not uncommon; insecurity was an essential feature of the system.

*Law of May 16, 1842*, reprinted in Thurston, *Fundamental Law of Hawaii* 133:

> Formerly, if the Landlord became dissatisfied he at once dispossessed his tenant even without cause, and then gave his land to whomsoever asked for it. (p. 133)
>
> Formerly, if the King wished for the property of any man, he took it without reward; even seized it by force, or took a portion only, just in accordance with his choice, and no man could refuse him. The same was true of every chief, and even the landlords treated their tenants thus. (p. 134)

The *Declaration of Rights of* 1839 made the first step towards changing all this:

> Protection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property, and nothing whatever shall be taken from any individual, except by express provision of the laws.[2]

---

[2] Translation from 1 Kuykendall, *The Hawaiian Kingdom* 160. No official translation was published until various sections were incorporated in Chapter III of the *Laws of 1842* and the *Constitution of 1840*.

The tenant remained a tenant. He paid a labor "tax" three days' work a month to the king, and another three ys a month to the landlord (Thurston, *op. cit.*, pp. 14-15). ndlords were forbidden to "causelessly dispossess" a ant, but could do so for cause. (*Ibid.*, 18-19)

Thus, the tenant came to have some legally recognized ghts in the land he was occupying. The effect was to ese the existing occupancy of land. The situation with ter was entirely different, for the Declaration of Rights dered a wholesale redistribution of water rights:

> 15. Of the division of Water for irrigation.
>
> In all places which are watered by irrigation, those farms which have not formerly received a division of water, shall when this new regulation respecting lands is circulated, be supplied in accordance with this law, the design of which is to correct in full all those abuses which men have introduced. . . . The allowance of water shall be in proportion to the amount of taxes paid by the several lands. For it is not the design of this law to withhold unjustly from one, in order to unjustly enrich another according to the old system which has been in vogue down to the present time. . . . This law condemns the old system. . . . Such is considered to be the proper course by this law, regulating the property of the kingdom; not in accordance with the former customs of the country which was for the chiefs and land agents to monopolize to themselves every source of profit. Not so with this law.[3]

t took some time to put these principles into effect. Many mes were discussed and some, such as the sale of lands fee simple, were tried. 1 Kuykendall, *The Hawaiian gdom* 277-294 covers these developments. The Land mmission was organized February 10, 1846 (2 RLH

---

[3] Thurston, *op cit.*, pp. 29-30, a reprint of the recodified translan, Chapter III, Section 15 of the *Laws of 1842*.

1925, p. 2131) and adopted a set of principles (2 RLH 1925, pp. 2124-2137). These recognized that

> . . . there are three classes of persons having vested rights in land—1st, the government, 2nd, the landlord, and 3rd, the tenant. (2 RLH 1925, p. 2126)
>
> . . . yet great evils have existed down to the present moment, owing mainly to the circumstance that several different classes of persons had undivided rights in the same lands. (2 RLH 1925, p. 2127)

and proposed partitioning of lands so as to:

> leave the owner, whether in fee, or for life, or for years to the free agency and independent proprietorship of his lands as confirmed. (2 RLH 1925, p. 2134)

These Principles were ratified by the Legislature on October 26, 1846 (2 RLH 1925, p. 2137). Before the Land Commission could act,[4] two steps remained to be taken. One was the division between the king and chiefs accomplished by the Mahele Book between January 27 and March 7, 1848. The other was to decide the question left open in the Principles, whether to give title "in fee, or for life, or for years" and what "commutation," if any, the tenants should pay. This caused much debate, 1 Kuykendall, *The Hawaiian Kingdom* 289-294, and was finally resolved by "Further Principles" adopted by the King and Privy Council on December 21, 1849, and ratified by the Legislature on August 6, 1850 (2 RLH 1925, pp. 2141-2142). These finally decided that "fee simple titles, free of commutation, be and are hereby granted to all native tenants who occupy and improve lands" (§§ 1 2). They also specified standards by which the Land Commission was to demine the extent of the lands to award. (2 RLH 1925, 142):

---

[4] Except for a few rare instances, mentioned in the Principles (2 RLH 1925, pp. 2126-2127).

> . . . .
>
> 6. In granting to the people their cultivated grounds, or kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people have cultivated in different spots, with the seeming intention of enlarging their lots; nor shall they be entitled to waste lands.

The standard was not that tenants be awarded what ir grandfathers had cultivated when Captain Cook ar- d. Lands that had gone out of cultivation or were modically cultivated were expressly excluded.

If these principles were to succeed in giving the tenants ir own fee simple lands to cultivate, they would need ter to continue cultivating their taro. However, the Land mmission awards seldom mentioned water rights. *Carter Territory*, 24 Hawaii 47, 58 (1917).

The solution was to regard water rights as an easement lied in the grant or award. It was adopted in the earliest ter case, *Peck v. Bailey*, 8 Hawaii 658 (1867):

> An easement appurtenant to land will pass by a grant of the land, without mention being made of the easement or the appurtenances. (8 Hawaii 661)

*e also:*

Hutchins, *op. cit.*, pp. 120-121.

This did not mean that there was an easement before award or grant. One parcel of land cannot have an sement in property belonging to the same owner. This s recognized in *Peck v. Bailey:*

> When the King owned this Ahupuaa, he had a right to apply the water to what land he pleased. (8 Hawaii 681)

It was the basis of the holding of *Kohala Sugar Co. v. Wight, supra,* that no water right was created by Kamehameha I building a ditch from Halawa to Halaula.

> He owned both lands, and until Halaula and Halawa had separate owners, no adverse use of the water could be in favor of one land against the other. (11 Hawaii 648)

The Court has recognized easements by implication. The use an owner makes of one part of his property for the benefit of another part is a "quasi-easement"; when he sells one part, it becomes an actual, implied easement.

> *Tanaka v. Mitsunaga,* 43 Hawaii 119, 122-123 (1959).

*See also:*

> 3 Tiffany, *Real Property* (3d ed.) § 781;
> 2 *American Law of Property,* §§ 8.40-8.41;
> 3 Powell, *Real Property,* §§ 411, pp. 454-456.

Thus, the use of water, and the ditches to carry it from one portion to another of the king's property "at and immediately before" the award or grant was a quasi-easement, which became an easement upon the making of the award or grant.

The principle of implied easements has been followed consistently from *Peck v. Bailey* through *Territory v. Gay.* By giving the tenant the land with the water as it actually existed at the time of the conveyance it accomplished the purpose of the statutory principle that the tenant be awarded the land he actually had in cultivation, by giving him secure title to the land and water he needed to continue the actual cultivation the statute intended to reward and encourage.

This also explains how our decisions are correctly applied to award appurtenant rights to crown and government lands. Since there are no awards or grants of these lands (except in isolated instances), it might be thought that a

echanical application of Hawaiian precedents would deny
e State appurtenant water rights.

Recognizing that our law of appurtenant water rights
simply an application of the law of quasi-easements, the
sence of awards or grants to the government is no ob-
tacle to awarding the State water rights on the same basis
anyone else. A quasi-easement may become an implied
sement reserved to the grantor.

*Stibbard v. Rego*, 38 Hawaii 48 (1948).

*See:*

*American Law of Property*, §§ 8.24-8.27 (emphasizing the historical development);

3 Powell, *Real Property* § 411, pp. 459-461;

3 Tiffany, *Real Property* § 781.

e reservation or exception of an implied easement
sed on the quasi-easement rule was adopted by this Court
*Tsunoda v. Young Sun Kow*, 23 Hawaii 660 (1917), in
ich the easement reserved was a water right. *See also:*
*bbard v. Rego*, 38 Hawaii 84 (1948).

hus, there was reserved to the Crown and government
t quantity of water customarily used on the Crown and
vernment lands at and immediately before the time of
award or grant.

G&R has never denied that the proprietary rights of the
ate should be entitled to this equal and reciprocal treat-
nt with those of private owners and that the State
uld be entitled to whatever appurtenant water rights
can prove on that basis, the same as anyone else.

The evidence to support the trial court's findings is
vered in Appendix I to this brief. However, it should
pointed out that the trial court's finding that the de-
iptions of the lands awarded and the lands adjoining the
nds awarded which are found in the Land Commission
wards and Royal Patents themselves "are entitled to

great weight" [Finding 61(1)] is based on the decision of this Court in *Carter v. Territory*, 24 Hawaii 47 (1917).

> Of course, where a *kuleana* was described in an award as *kalo* or *loi* land it would be evidence that the land was entitled by ancient custom to a supply of water for cultivation of wet land taro, and the lack of such description would probably be evidence to the contrary, though not conclusive. (24 Hawaii 58-59)

The same was true in *Wailuku Sugar Company v. Widemann*, 6 Hawaii 185 (1876). In that case, the plaintiff claimed that his land was a *lele* of an *ahupuaa*, and as such entitled to a share in the waters of the *ahupuaa*. This Court refused to decide the case because the award was not in evidence but annulled the decision "without prejudice to the right of either party to bring" new proceedings. McBryde points out (Brief, p. 21) that this Court found:

> The testimony of the witnesses seems to me to prove quite clearly that this land was anciently watered from the Waiehu stream, . . . but that it had not had water used on it for the purposes of irrigation for a period of over twenty years previous to its sale to the plaintiffs in 1864. . . . (6 Hawaii 186)

McBryde argues (Brief, pp. 21-22) that since the land had not been irrigated since before 1844, the refusal of this Court to say the land was *not* entitled to water indicates a use did not have to continue up to the time of the award. What McBryde fails to see is that if its theory (that ancient but abandoned uses determined appurtenant rights) were correct, the court [having found "that this land was anciently watered"] would have affirmed the decision below, whereas it "annulled" that decision. The reason the court did not reverse out of hand and hold the land was entitled to no water was that the landowner had an unprecedented claim that had a right to water as a *"lele"* of the *ahupuaa*. Since the award was not in evidence which would show the facts "it is therefore impossible to consider the positions taken." (6 Hawaii 186.)

The great weight given to the Land Commission Awards also a factual result of the evidence in this case. The stimony of Dr. Handy [Finding 61(7)(a)] showed the ecisive nature of the Land Commission Awards in determining whether land was ever in taro (Tr. 73). So did hat of Dr. Emory (Tr. 713, 717, 737-739). The surveyors alled as expert witnesses, Dunn, Cox and Towill, all relied n the Land Commission Awards very heavily in forming pinions about whether land was cultivated in taro.

On the other hand, there is practically no description of he use of land in Hanapepe before the first Land Commission Award there in 1851. The only eyewitness description recorded before then of Hanapepe is that of Hiram ingham in 1824 (Ex. G&R-F-6), which reports that—

> For the first half mile from the sea, the valley seems sterile, and is little cultivated, but has a pleasant grove of cocoanut trees.

There is only one parcel of which there is any evidence at it was cultivated in taro before the Land Commission t had gone out of taro by then. This is Government Lot . The evidence before the Land Commission shows that re were some "waste lois" (Ex. G&R-G-6) or "he mau kahiko" (State Ex. 48) (meaning "some old taro tches" in Maialoa, which is that lot. The existence of d taro patches there was confirmed by one of the kamaaina witnesses. With this one exception, there is no "memory of man" that any area not in taro at the time of the and Commission had been cultivated earlier. Thus, the gal doctrines espoused by the State and McBryde are entially moot as far as this case is concerned since there no evidence to which to apply them. Undoubtedly the me will be true in any future water case. No witness can member back before the Mahele, and documentary evidence referring to specific parcels of land is exceedingly are. Any attempt to reconstruct the use of water on particular parcels before that date would be sheer speculation.

The argument of the State (Brief, pp. 58-59) that the overnment's immemorial rights cannot be divested need not be taken seriously, for it proves too much. Its immemorial rights were those of the king, that is, every drop of water everywhere in Hawaii. If this were true, that none of the king's immemorial water rights have ever been divested, there would be no water law and the scores of water cases decided by this Court would have to be overruled.

McBryde's theory that appurtenant water rights accrued but disused before the Land Commission have somehow persisted is legally unsound. The reforms of 1839-1855 were, in Professor Kuykendall's words, a "Land Revolution" (1 *Hawaiian Kingdom*, Ch. XV). They were a new departure. As to land, the reforms granted as rights what until then the tenant had merely had a customary and revocable privilege of occupying, he receiving only what he was then and there occupying and cultivating.

As to water, there was an even greater revolution as the *Declaration of Rights* of 1839 and the *Laws of 1842* ordered a wholesale redistribution of water, making a clean break with the past.

Thus, the truth that the Land Commission awards are the ultimate origin of title applies with especial force to water. Even with land, this Court has repeatedly refused to go behind the Land Commission awards to consider previous interest and equities:

*Kukuiahu v. Gill,* 1 Hawaii 90 (1851);

*Bishop v. Namakalaa,* 2 Hawaii 238 (1860);

*Kaai v. Mahuka,* 5 Hawaii 354 (1885);

*Atcherly v. Lewers & Cooke,* 18 Hawaii 625, 634-639 (1908), aff'd 222 U.S. 285 (1911);

*Territory v. Gay,* 26 Hawaii 382, 396 (1922).

As Mr. Justice Holmes said in *Atcherly, supra,* the refusal is "fortified by logic and good sense" (222 U.S. 295).

[Material Deleted in Printing]

# APPENDIX W

## McBRYDE SUGAR CO., PETITION FOR REHEARING IN NO. 4879, FILED IN THE SUPREME COURT OF HAWAII ON MAY 21, 1973 (EXCERPTS)

No. 4879

IN THE SUPREME COURT OF THE
STATE OF HAWAII
OCTOBER TERM 1972

Special Proceeding No. 108

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, *et al.*,
*Defendants-Appellees, Cross-Appellants.*

APPEAL FROM FINAL JUDGMENT
DATED JANUARY 30, 1969

FIFTH CIRCUIT COURT
HONORABLE BENJAMIN M. TASHIRO, Judge

PETITION FOR REHEARING
APPENDICES
CERTIFICATE OF COUNSEL
and
CERTIFICATE OF SERVICE

[Filed May 21, 1973]

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No. 4879

IN THE SUPREME COURT OF THE
STATE OF HAWAII
OCTOBER TERM 1972

**Special Proceeding No. 108**

McBRYDE SUGAR COMPANY, LIMITED,
*Plaintiff-Appellant, Cross-Appellee,*

vs.

AYLMER F. ROBINSON, *et al.*,
*Defendants-Appellees, Cross-Appellants.*

**APPEAL FROM FINAL JUDGMENT**
**DATED JANUARY 30, 1969**

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, Judge

## PETITION FOR REHEARINNG

**McBRYDE SUGAR COMPANY, LIMITED** (herein "McBryde") petitions this Honorable Court for a rehearing on matters determined in its opinion of January 10, 1973,[1] and in support of its petition shows the Honorable Court as follows:

## PRELIMINARY STATEMENT

Petitioner's principal business for over 70 years has been the development and operation of an irrigated sugar plantation using surface waters and other waters believed to be private property by all persons knowledgeable in the water law of Hawaii as determined by this court and Commissioners of Private Ways and Water Rights in a series of cases extending over a period of a century. During this entire period, the then government encouraged in various ways the use of private water on arid and semi-arid lands for irrigation. The decision entered in this case drastically and retroactively overturns on a broad front this established Hawaiian water law and private property rights and interests in surface waters based thereon. Private property rights and substantial interests are divested and transferred retroactively to the State as part of the public domain in part by placing limitations on the right to divert or use private water in the manner used in Hawaiian agricultural practices for a period of over a century. This startling and unpredictable decision was entered on points raised by the court *sua sponte*, outside the pleadings, without claim therefor by the State, and first disclosed to the parties in the majority opinion. This petition will show the grounds on which petitioner asserts that it is entitled to a rehearing as a matter of law. In the extraordinary circumstances, petitioner will also respectfully suggest the type and kind of evidentiary hearing which should be given if the court is to reconsider the points raised in the opinion to conform to elementary requirements of procedural due process and fairness in the judicial determination of a "case or controversy."

---

[1] Reported in 54 Haw. 174, 504 P.2d. 1330 (1973) reference to the opinions are to the Hawaii report.

## GROUNDS FOR REHEARING

1. McBryde has been deprived of its property without due process and without just compensation under Article V and the Fourteenth Amendment to the United States Constitution and under Article I, Sections 4 and 18 of the Hawaii State Constitution.

2. In violation of the court's rules and the requirements of § 602-13 Hawaii Revised Statutes ("HRS"), as well as of procedural due process, McBryde has been deprived of its right to be heard on issues of fact and issues of law, and was not permitted to plead or prove its defenses prior to the determination which deprived McBryde of substantial property rights never claimed by the State.

3. McBryde in reliance on long established water law of Hawaii has made large expenditures (see attached Affidavit) to develop its plantation, and the court's retroactive change made in the property law, which would preclude McBryde from transporting and using its water to the lands which it has developed and owns, was wholly outside the issues on appeal and outside the jurisdiction of this court on the record now before it.

4. The opinion raises a substantial federal question by denying vested rights recognized by Hawaiian "customs, laws and decisions of courts" which are protected by applicable federal statute, viz., 43 U.S.C. § 661[1] and related statutes.

5. The court has erroneously failed to apply the statutory requirement of Section 1-1 H.R.S. which requires adherence to the law established by Hawaiian usage.

6. The court has erroneously made applicable a wholly unworkable version of the common law doctrine of riparianism. The anterior history of land titles in Hawaii demonstrates the court's conclusion that surface waters in Hawaii belong to the "public", subject only to ancient appurtenant rights (inseparable from the land to which it is appurtenant) and to riparian rights (inseparable from the riparian land) is erroneous and unsupportable.

7. The riparian doctrine adopted by the court cannot under common law transform private property into public property, and if the opinion modifies the common law in this respect, the opinion is unconstitutional.

---

[1] 43 USC § 661. "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, . . ."

## CONCLUSIONS ON WHICH NO HEARING HAS BEEN GIVEN

The rule of court permitting the filing of this petition for rehearing gives petitioner its first and earliest opportunity to present before any tribunal having jurisdiction the statement of its claims—including its Constitutional and substantial-Federal-question claims. This court has the affirmative duty of making its determination of the Constitutional and Federal-question issues and substantive Hawaii law issues so presented after a due process hearing has been afforded so that any other court reviewing the judgment may have the State's highest court's views thereon. The points and legal principles and conclusions to which McBryde objects and on which McBryde has had no opportunity to be heard are summarized as follows:

1. "Thus by the Mahele and subsequent Land Commission Award and issuance of Royal Patent right to water was not intended to be, could not be, and was not transferred to the awardee, and the ownership of water in natural watercourses, streams and rivers remained in the people of Hawaii for their common good. Therefore, we hold that as between the State and McBryde, and between McBryde and Gay & Robinson, the State is the owner of the water in the Koula Stream and Hanapepe River." (Op. 186)

2. "We hold that the right to the use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled. Thus, neither McBryde nor Gay & Robinson may transport water to another watershed, which they may have the right to use under their respective appurtenant water rights." (Op. 191)

3. "It would appear that in the light of history and historical background of the Hawaiian Kingdom, the provision of the law enacted in August 6, 1850, which reserves to property owners the 'right to drinking water and run-

ning water,' was a codification or statutory enactment of the doctrine of riparian rights recognized as part of the common law by the English and Massachusetts courts.' " (Op. 197)

4. Having held that the final judgment in *Territory of Hawaii v. Gay,* 31 Haw. 376 (1930), which held the "normal surplus 'water' was property of Gay & Robinson and *not the property of the State,*" was conclusive of rights, questions and facts in issue as to the parties and their privies, in all other actions in the same or any other judicial tribunal or concurrent jurisdiction" (Op. 178) and hence binding on the State and Gay & Robinson and their privies, the Court erroneously holds that there can be no "normal daily surplus water" as this term was used in said case and that Gay & Robinson is entitled to "nothing under the ruling of the case." The court by the same reasoning erred in holding that between the State and McBryde, McBryde does not have prescriptive rights to the 2,084,600 gallons per day adjudicated and awarded to McBryde by the lower court as a prescriptive taker from Gay & Robinson because the State (and not Gay & Robinson) is the owner of the water.

5. The overruling of the holding in *Carter v. Hawaii,* 24 Haw. 47 (1917); *Terr. v. Gay,* 31 Haw. 376 (1930); *Peck v. Bailey,* 8 Haw. 658 (1867); *Haw. Comm. & Sugar Co. v. Wailuku Sugar Co.,* 15 Haw. 675, 680 (1904) and a large number of other Hawaii Supreme Court cases recognizing the use of private surface waters for irrigation in lands not riparian.

## SUGGESTED PROCEDURE TO ASSURE A DUE PROCESS HEARING

The ultimate effect of the decision is to award to the State either directly or by indirection in its appeal to this court property rights which (so far as our search has been able to reveal) exceed those ever claimed or asserted since the Mahele by the duly constituted executive officers of e Kingdom, the Provisional Government, the Republic, e Territory, or the State of Hawaii.

For purposes of this petition the decision of the court treated as though it was a special pleading on behalf f the State, although the views of the State may seriously iffer particularly with respect to the restriction on the se of riparian and appurtenant water out of the watershed f origin. In this unique and unprecedented situation, beause of the importance of the problems involved, we repectfully suggest to the court the following as the orderly rocedure to assure the Petitioner a due process hearing efore the final judgment of this court is entered:

1. That the court vacate its opinion and limit the issues n appeal to those issues raised by the parties and render new decision in the light of the vested rights of the arties under the established statutory and decisional law this jurisdiction; and that the court provide an opporunity for the parties to further argue and brief any such sues to the extent that the court determines it necessary or such a decision.[1]

2. If the court thereafter determines that a further evientiary hearing is necessary with respect to issues that have not been raised in the court below, then the court should require or permit the State to make a full presentation of its claim and then permit all parties to this proceeding to present any and all defenses of fact or law with respect to such restated claims.

On appeal in a special proceeding for the determination of water rights under § 664-36 HRS, the Supreme Court has full authority to consider new evidence which could not with due diligence be obtained before the hearing. The issues that may be raised will require the presentation of complicated factual material, including evidence of Hawaiian usage, hydrologic and geologic factors affecting the administration of irrigation systems; existing governmental franchises for transport of private water; contractual and other arrangements entered into under which the use of the water for irrigation has been accomplished in the sugar industry in general and by McBryde in particular for a period of more than 70 years. Such evidence will clearly demonstrate that "by the accretion of time and response of affairs, substantial interests have established themselves"[1] and that the common law riparian doctrine of 1850 is in no way suitable for conditions in Hawaii and that the principle of *stare decisis* should be adhered to in this case.

---

[1] After the argument of any cause, or when the cause is submitted on briefs, if the court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the point or proposition before the courts [L 1892, c 57, § 57; . . . ."

The court should thus be able to consider more detailed historical material (including the legislative background for the implementation of the Mahele) than that included in the opinion and bearing directly on the statutory construction of the Act of August 6, 1850 and other related statutes. The court will thus be able to consider recent studies by Federal and State and other agencies that demonstrate the unsuitability of the riparian system as applied to normal surplus waters of surface streams in Hawaii.

McBryde alleges that it will be able to and should be given an opportunity to prove that fairness and manifest justice as well as susbtantive due process requires that existing uses developed in reliance upon established rules of property should be recognized. In the alternative the State should be equitably estopped by reason of governmental action to claim title to water rights that McBryde had customarily used on its plantation and developed over many years at large expense.

---

[1] This is the language out of Helvering v. Hallock, 309 U.S. 106 (1940) relied on by the majority opinion as a justification for departure from the principle of *stare decisis*.

This statutory special proceeding contemplates the entry f a judgment capable of practical and continuous adminisration. After final disposition by this court, an evidentiary earing as to the form and content of the final judgment ill be necessary. If all further evidentiary hearings are eferred to and held before a competent master for recomended findings and conclusions to be considered by the urt, it is believed that the entry of a final judgment in his extremely complicated and now overlong proceeding ill be expedited.

WHEREFORE, McBryde prays that the court, upon onsideration hereof and of the affidavit of E. B. Holroyde, President of Petitioner attached hereto and made a part ereof, vacate its opinion and enter an order under the erms of which petitioner is afforded a due process hearing efore final determination is made of petitioner's rights n this proceeding.

DATED: Honolulu, Hawaii, May 21, 1973.

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[Material Deleted in Printing]

No. 4879

IN THE SUPREME COURT OF THE
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**Special Proceeding No. 108**

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**APPEAL FROM FINAL JUDGMENT
DATED JANUARY 30, 1969**

FIFTH CIRCUIT COURT

HONORABLE BENJAMIN M. TASHIRO, Judge

## POINTS AND AUTHORITIES RELIED ON IN SUPPORT OF PETITION FOR REHEARING

The points and authorities relied on are all interconnected and should be considered in relation to each other. Thus, it is our contention that due process has been denied in the primary sense of the denial of a proper hearing. As a result of this denial, the court demonstrably has made errors of fact as well as law. It is also asserted that if the court had been made fully aware of all the implications of its legal conclusions, it would have arrived at a different result first, because it would have adhered to the established rules and precedents and given greater weight to *stare decisis*; secondly, because it would not have adopted as a matter of policy a common law water doctrine which is wholly unsuitable to this state and which is retrogressive rather than progressive; and finally, if a proper determination had been made of the legal issues under traditional Hawaiian canons of construction, substantive Constitutional questions and the related substantial Federal question would have been avoided.

## I. PROCEDURAL DUE PROCESS REQUIRES THAT McBRYDE BE GIVEN AN OPPORTUNITY TO PRESENT EVIDENCE AND ARGUMENTS IN DEFENSE OF ITS RIGHTS AND PROPERTIES.

### A. McBryde was given no notice of claim nor has any claim been made for the property rights taken from McBryde.

The denial of procedural due process is pin-pointed because the majority opinion of the court is both an assertion and determination of claim for the State and is not a decision on the "case or controversy" that is on appeal[1] or that has been tried below.

In the statement of points relied on, the first four of the six points raised by the State refer to specific findings relating to quantity determinations of ancient appurtenant rights. The fifth and sixth points of the State (State's Op. Br., pp. 8-9) read as follows:

> "5. The lower court erred in its conclusion of law that 'This Court holds that all the surplus waters of Koula and Manuahi Streams, without distinction between "normal" and storm or freshet" surplus, belong to Gay and Robinson on whose land they rise.',

---

[1] § 602-5 HRS is the basis for this court's appellate jurisdiction which was implemented by Rules 3(3) and 3(5). These rules eliminate the requirements for specifications of errors and substitutes therefor "questions presented for decision" (Rule 3(3) and "points relied on" (Rule 3(5). Together these constitute the scope of the issues or the "case or controversy" on appeal. See Muskrat v. U.S., 219 U.S. 346, 356-59 (1911): "The judicial power is capable of acting . . . only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law." State v. Tin Yan, et al., 44 Haw. 370, 373 (1960) ("of necessity" this court can consider only the question decided below).

for reason that storm and freshet surplus water should be divided proportionately among the wet land owners.

"6. The lower court erred in not making a finding that water in excess of 50,000,000 gallons per day (which is the total water available 50% of the time in Hanapepe River as shown in its table under Finding No. 55, P. 17), is storm and freshet water which is to be apportioned among the wet land owners in proportion to their total wet land holdings. (Decision, Finding No. 55, p. 17)"

The court has only to compare side by side the State's points with the court's syllabus and it is found that none of the conclusions are responsive to the points. The court has converted an appeal from Commissioner's findings into a sweeping judicial enactment of basically new Hawaiian water law without an opportunity for hearing thereon by any party aggrieved or otherwise. Thus, in the secrecy of the Chambers of the Justices without such illumination as might be afforded by full briefs and arguments of counsel for parties, the court has proceeded on its own initiative, to enunciate the most sweeping changes in principles of water law which changes can only result in prolonged commercial uncertainty, confusion and possibly prolonged litigation. To what extent legislative corrective action could or should be taken could be the subject of Constitutional disputes for years to come.

§ 602-13 HRS cannot be ignored in this case since in the trial court the State substantially joined in the position taken by McBryde with respect to surplus water and took almost an identical position with McBryde again before this court. Thus, we are confronted with the fact that not only is there an absence of a notice of hearing but there appears to be an absence of an identifiable claimant for the property rights which have been awarded to the State. In an analogous situation[1] dissenting Justices took occasion to point out that "Here, contra to the record on appeal, the majority of this court is changing, creating and inserting new facts; changing, drafting and inserting new pleadings, . . . The opinion itself, imposes upon the court and the legal profession the situation where one must ask: 'Who is the someone asserting a contra claim?' "

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[1] In Re Castle. 54 Haw. 276 (1973). The State has not asked for an exceptional position but the court has conferred it upon

In these circumstances, it seems evident that McBryde's right to be heard should not be made to depend upon its ability to convince this court through the limited opportunity afforded by a petition for rehearing that it will prevail on all points prescribed after a due process hearing has been permitted.

### B. § 602-13 HRS requires the court to withhold its decision until an opportunity has been given for argument before the court.

§ 602-13 HRS was adopted as a part of Act 57 of the Session Laws of 1892, which was a comprehensive "Act to Reorganize the Judiciary Department.[2] This court held in *Byrne v. Allen, et al.*, 10 Haw. 338 (1896) that on a point not raised or argued in this court, counsel was entitled of right to be heard under the statutory provision. After argument on rehearing, the Order for New Trial which had been entered in a prior opinion was reversed.

In *Estate of Bishop*, 35 Haw. 545 (1940), the court held that under the statute a rehearing upon timely petition

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them; nevertheless Justice Brandeis famous dictum may be appropriate: "At the foundation of our civil liberties lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizens and the development of our liberty, insistence upon procedural regularity has been a large factor." Burdeau v. McDowell, 256 U.S. 465, 477 (1921)

[2] The same comprehensive Act in § 2 thereof (now § 601-5 HRS) requires judges to "be independent of both the executive and legislative departments of the government."

was the proper "remedy for the party aggrieved when this Court decides a point material to the decision without counsel having been given an opportunity to argue the same."

The statute reflects established usage and the mode of procedure in Hawaiian courts, a violation of which would give rise to a deprivation of procedural due process, as shown in cases that are referred to in the next section of this petition.

### C. The requirements of procedural due process have clearly not been met.

The most concise statement of procedural due process is contained in the *Constitution of the United States of America, Revised and Annotated* (1938) (Sen. Doc. No. 232, 74th Cong. 2d Sess.) where at p. 654 the following appears:

> ". . . Whatever else may be uncertain about the definition of the term, all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure and without notice or an opportunity for a hearing." (*Op. cit.*, p. 654.)

This was recently restated in *Fuentes v. Shevin*, 32 L. Ed.2d 556, 407 U.S. 67 (1973) as follows:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' . . . [citations omitted] It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner' . . . [citations omitted]" (pp. 569-570)

The right to notice and the hearing before property rights are impaired is of long standing in American Jurisprudence and accords with practice in Hawaii long before the United States Constitution was extended to it. Henry Wheaton, the reporter for early United States Supreme Court cases attributes to Daniel Webster the argument that due process of law implies "a law which hears before it condemns; it proceeds upon inquiry, and renders judgment only after trial." *Brief for Appellant, Trustees of Dartmouth College v. Woodward,* 4 Wheat (U.S.) 518, 581 4 L.Ed. 629, 645 (1819).

The recent case of *Fuentes v. Shevin, supra,* which has already become a landmark case in the field of summary deprivation of rights, indicates the extreme sensitivity of the courts when the procedural safeguards of the 14th Amendment have been invoked.

> "The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 170-172, 95 L Ed 817, 853, 854, 71 S Ct 624 (Frankfurter, J., concurring)." 32 L.Ed.2d, p. 570.

The formulation of the doctrine supported by the long line of cases referred to in *Fuentes* is that although "due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' . . . and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' . . . the Court has traditionally insisted that, *whatever its form, opportunity for that hearing* must be provided before the deprivation at issue takes effect. . . .'' 32 L.Ed.2d, at p. 571 (emphasis added).

The court emphasizes that the protection is extended to ''any'' property interest and obviously the interests here being divested are so fundamental and vital to McBryde's business as to preclude State adverse action of any kind without notice. ''The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest.' . . . *The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing.* 'To one who protests against the taking of his property without due process of law it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' '' (32 L.Ed.2d at 573-74 (emphasis added).)

*Moore v. California Minerals Products Corp.*, 115 Cal. App.2d 834, 252 P.2d 1005 (1953) involved a judgment entered by a trial judge on a ground not raised or argued. On appeal, the court held that notwithstanding that no reargument before the trial judge had been sought, nevertheless, procedural due process required the judgment to be vacated. The court's language is particularly pertinent to the case at bar:

> ''. . . [W]e have not discovered another case in which judgment was rendered upon a point of law raised by the court with no warning of counsel and no opportunity given to ward off the blow. Elementary principles of due process support our conclusion that if, during a trial, the court, sua sponte, unearths a point of law which it deems to be decisive of the cause, the party against whom the decision impends has the same right to be heard before the decision is announced that he

> has to produce evidence upon the issues of fact. Denial of that opportunity deprived defendant of a substantial right to which it was entitled by virtue of the guarantee of due process." (252 P. 20 at 1007)

*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) has become a leading case in the field of procedural due process. In a suit against the Treasurer of a county for alleged over-assessment of bank stock at a different and higher rate than for other property, relief was denied by the Missouri Supreme Court on the ground that the bank should have sought review of the Treasurer's activity by the State Tax Commission. This holding in effect overruled a previously decided Missouri decision that the State Tax Commission had no power to review or grant relief in such cases. The United States Supreme Court, in an opinion by Mr. Justice Brandeis, found that this was an effective deprivation of procedural due process:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of a lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." (pp. 678-679)

It must be obvious to this court "that the only remedy ever available" to McBryde in this case on the points referred to in this petition, will result from the rehearing and trial sought by this petition. Should the rehearing be denied, this denial of the "only remedy" will bring this case squarely within the *Brinkerhoff* doctrine covering judicial action.

> ". . . If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the 14th Amendment would be obvious [citation]. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid [citation] state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.
>
> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; . . . . (At p.680)
>
> ". . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. . . ." (At p.681)

The above is merely a sampling out of the great number of procedural due process cases determined in our rapidly changing era. It can truthfully be said that the requirement of procedural due process has a "changing changelessness" which makes it applicable to every new situation no matter how it arises where as here fundamental judicial fairness has been violated by lack of appropriate notice and hearing.

[Material Deleted in Printing]

## . THE TRANSFORMATION OF PRIVATE PROPERTY INTO PUBLIC PROPERTY WITHOUT COMPENSATION BY JUDICIAL DECISION VIOLATES DUE PROCESS OF LAW.

Procedural due process mandates the grant of a rehear- g, but this section will demonstrate that on the record efore this court and the offers of proof contained herein, e opinion clearly denies McBryde substantive due process.

Under local customs, laws and decisions of this court, ppurtenant, prescriptive and certain other water rights ve been consistently recognized and confirmed and thus ve been "vested" in owners of land.

As to all of these water rights, the right involved the e of total consumption of the water. All adjudicated ater rights in Hawaii recognized a power of total con- mption by the owner, with no requirement of a return the stream. The private owner could thus separate his ater right from the land, divert and consume the amount water to which he was entitled, in or out of the water- ed, or use it in any manner he determined.

This court has (1) substituted for Konohiki rights, a ctrine of riparian rights in its 1850-Massachusetts com- on law meaning for all surface streams navigable or un- vigable, (2) destroyed the established Hawaiian doctrine prescriptive water rights to stream water, which by awaiian law permitted acquisition by adverse possession, d (3) destroyed the right to separate appurtenant water ghts from the land or to divert and transport surface ater from one watershed to another.

This substitution of a new water rights doctrine for the tablished one, thereby divesting and confiscating rights retofore vested,[1] without payment of just compensation is in contravention of United States and Hawaii constitutional prohibitions.

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[1] A water right acquired by prescription is a vested and perfect al title. Wutchumna Water Co. v. Ragle, 148 Cal. 759, 84 P. 2 (1906); Pioneer Irr. Distr. v. Smith, 48 Idaho 734, 285 P. (1930). The riparian right is a *vested* right. Eastern Oregon nd Co. v. Willow River Land & Irr. Co., 201 F. 203 (9 Cir.

As an initial proposition, a newly established civil government or state may refuse to follow the English common law in whole or in part and adopt or recognize any water allocation law—the whole matter depending upon local customs, constitutions and written or unwritten laws prevailing locally, shaped by the necessities of the community. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 79 L.Ed. 1356 (1935); *Mettler v. Ames Realty Co.*, 201 P. 702 (Mont. 1921).

Except it be for a public purpose and on payment of just compensation, the state under Constitutional limitations, has no power to substitute new doctrines for old established doctrines in any manner that destroys the therefore recognized and vested rights of water rights owners in existence prior to or at the time of the adoption of the new rule overturning the old.

An act declaring all waters within the state belonged to the public and subject to appropriation was held in *St. Germain Irr. Co. v. Hawthorn Ditch Co.*, 32 S.D. 260, 143 N.W. 124 (1913) to be in conflict with constitutional provisions prohibiting the taking of private property for a public use without just compensation insofar as it interfered with the right which existed in riparian owners as recognized by the decisions of the courts of that jurisdiction.

Addressing itself to the constitutional infirmities of a statute approving the doctrine of prior appropriation, the

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1912). Appropriative rights (analogous to appurtenant rights) belong to the land owner and are in the nature of *vested* rights. Mitchell Irr. Dist. v. Sharp, 121 F.2d 964 (10 Cir. 1941), cert. den'd 314 U. S. 665, 86 L.Ed. 534 (1941). The statute conferring jurisdiction on the Water Commissioner requires that water rights be adjudicated "in conformity with vested rights" (§ 664-34 HRS). This is another statutory recognition that water rights are "vested rights."

North Dakota Supreme Court in *Baeth v. Hoisveen*, 157 N.W.2d 728 (N.D. 1968) commented that "[a] declaration that all waters in the State belong to the public and may be appropriated . . . is a valid exercise of the State's police power, *insofar as it does not expropriate* 'vested rights.' "[1]

In *Williams v. City of Wichita*, 279 F.2d 375 (10th Cir. 1960), the court stated in reference to an act which abandoned the doctrine of riparian rights for that of appropriative rights:

> "A state may modify or reject the riparian doctrine and adopt the appropriation system *but in so doing it must recognize valid and existing* vested rights."

In *Nielson v. Sponer*, 46 Wash. 14, 89 P. 155 (1907), an act which provided that a person upon whose lands seepage or spring water first rises shall have a prior right to such waters was held unconstitutional as depriving one of his property without due process of law insofar as it interferred with the rights of lower riparian owners to such waters which had been acquired by use of the water before the act was passed, and had been recognized by prior court decisions in that jurisdiction.

In *Miller & Lux v. Madera Canal & Irrig. Co.*, 155 Cal. 59, 99 P. 502 (1909), it was urged that in promotion of the common weal, the court should by overruling prior decisions or by adopting new doctrines of water rights, curtail in som way the riparian right in favor of non-riparian proprietors. The court stated:

> "Neither a *court* nor the *Legislature* has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide,

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[1] See also, Palmer v. R.R. Comm. of California, 138 P. 997 (Calif. 1914), holding (on rehearing) that a 1911 statute containing a like declaration of public ownership could not affect water rights acquired by prescription, purchase or appropriation prior to its adoption. (This case is also discussed under Part III.)

> and no consideration of policy can justify the taking of private property without [just] compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. . . ." (At p. 512.)

In *Herminghaus v. Southern California Edison Co.,* 200 Cal. 81, 252 P. 607 (1927), the court persisted in its position that it could not change the law where rights were vested when it held that the common law of riparian rights must prevail against subsequent appropriators who were unwilling to compensate the damage caused by appropriations.

Rather than seek the change through the power of eminent domain, the State of California amended its Constitution in an attempt to serve the general welfare of the state by preserving and limiting both riparian and appropriative rights while curbing either from being exercised unreasonably or wastefully.

Among other amendment proposals, one relevant herein, was one to revoke or nullify all common law protection to riparian rights and to do it retroactively as of the year 1850, the year California acquired statehood. The Joint Committee of the California Legislature, recognizing that public interest requires appropriation, not expropriation, rejected all dispossession proposals as confiscatory. See *United States v. Gerlach Live Stock Co.,* 339 U.S. 725 at 750-751 (1950).

Because the Due Process Clause of the 14th Amendment forbids confiscation of private property without payment of just compensation no less through its courts than through its legislature, this court's overruling of prior decisions which recognized vested water rights effects a taking within the meaning of the 14th Amendment.

The prohibition of the 14th Amendment extends to all acts of the state, whether through its legislature, its executive or its judicial authorities and is therefore violated whenever any person, by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state.

> "If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment." *Chicago, B & O R. Co. v. Chicago,* 166 U.S. 226, 41 L.Ed. 979 (1897).

In *Harris v. Brooks,* 225 Ark. 436, 283 S.W.2d 129 (1955), it was held that vested rights to water in a stream or lake which had accrued to a riparian owner under prior decisions of the court could not be constitutionally negated by adoption by the court in a later decision of the reasonable use theory in preference to the natural flow theory, theretofore prevailing.

The concurring opinion of Justice Stewart in *Hughes v. Washington,* 389 U.S. 290, 294-298 (1967) is directly in point. When Washington became a state in 1889, Article 17 of the Washington Constitution asserted ownership in the state of the beds and shores of all navigable waters in the state. In *Ghione v. State,* 26 Wash. 2d 635, 175 P.2d 955 (1946), the state asserted that Article 17 operated to deprive riparian owners of accretions after 1889. The Washington Supreme Court rejected that assertion and held that title to accretions was vested in the owner of adjoining land after 1889 as before. In *Hughes,* 20 years after the *Ghione* decision, the State Supreme Court reached an opposite conclusion. Of this sudden change in state law, unpredictable in terms of relevant precedents, Justice Stewart commented:

> ". . . [A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. . . .
>
> . . . .
>
> "There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, . . . pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a state says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retro-active transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."[1]

There can be little doubt that the impact of this court's opinion upon the rights of McBryde is as clear and as great as the impact on Mrs. Hughes of the judicial change in Washington law, which Justice Stewart characterized as a "sudden change in state law, unpredictable in terms of relevant precedents." By (1) curtailing the right to separate the water rights from the land and to divert and transport water to another watershed, thereby forcing the water theretofore diverted to be returned to the public domain, (2) by redefining appurtenant water rights as to water needed for drinking and other domestic purposes as riparian water rights to be returned to the public domain after use by the riparian owner, and (3) by declaring all water flowing in natural water courses to be owned by the state and therefore not subject to the Hawaiian doctrine of prescription, this court has transferred to the State by changes "sudden and unpredictable in terms of relevant precedents" private vested water rights without payment of just compensation therefor. This result the State could only have obtained for itself through eminent domain.

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[1] 398 U.S. at 296-298. The majority reached the same result on the grounds that the question was governed by federal, not state, law, and that under federal law one who traced his title to a federal grant prior to statehood was the owner of accretions.

# APPENDIX X

## SELWYN A. ROBINSON, ET AL., PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII, FILED IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-

SELWYN A. ROBINSON, ELEANOR ROBINSON, RUSSELL S. ROBINSON, RUTH R. LEFIELL, MARION R. KEAT, JEAN R. WEIR, HELEN M. ROBINSON, KEITH P. ROBINSON and BRUCE B. ROBINSON, *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioners SELWYN A. ROBINSON, ELEANOR ROBINSON, RUSSELL S. ROBINSON, RUTH R. LEFIELL, MARION R. KEAT, JEAN R. WEIR, HELEN M. ROBINSON, KEITH P. ROBINSON and BRUCE B. ROBINSON, hereinafter referred to as "G&R,"[1] pray that a writ of certiorari issue to review the judgment and opinions of the Supreme Court of Hawaii in the above cause on December 28, 1973.

## APPENDICES

Petitioners have filed a Joint Appendix together with appellants-petitioners in *McBryde Sugar Company, Lim-*

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[1] Petitioners are tenants in common of the land and water rights involved and are referred to herein and below as "Gay & Robinson" or "G&R."

*ited, et al.* v. *State of Hawaii*, No. 73- and petitioners in *Ida Albarado, et al.* v. *State of Hawaii*, No. 73-

Appendix A relating solely to petitioners herein, and Appendix B, giving the text of Hawaiian statutes, are attached to this Petition.

## OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 54 Hawaii 174, 504 P.2d 1330 (Joint Appendix 66). The opinion denying rehearing, dated December 20, 1973, is reported at 55 Hawaii 260, 517 P.2d 26 (Joint Appendix 114).

The decision of the trial court (Joint Appendix 1) is not reported.

## JURISDICTION

The decision of the Supreme Court of Hawaii was filed January 10, 1973 (Joint Appendix 66). Timely petition for rehearing was filed on May 18, 1973 (Appendix A, *infra* pp. 26-29). An order (Record Doc. No. 55) extending time to petition for rehearing was filed January 15, 1973. An order (Joint Appendix 108) was filed June 18, 1973, permitting further briefing. The opinion denying rehearing (Joint Appendix 114) was filed December 20, 1973. The only judgment of the Supreme Court of Hawaii was entered on December 28, 1973 (Joint Appendix 159). The jurisdiction of this Court is invoked under 28 USC § 1257 (3).

## QUESTIONS PRESENTED

1. Did the decision of the Supreme Court of Hawaii that the State owns all water and that petitioners may transport no water out of the watershed fail to give the effect required by the Constitution[a] to the judgment in *Territory*

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[a] Judicial power (Article III), Full Faith and Credit (Article IV), Necessary and Proper clause (Article I, Sec. 8), the Su-

v. *Gay,* 52 F.2d 356 (1931) that G&R owns the "normal surplus" water and may transport it out of the watershed?

2. Did the Supreme Court of Hawaii, by overruling its long line of undistinguishable decisions defining property rights in water on which petitioners had substantially relied, deprive petitioners of property without due process of law or just compensation?

3. Did the Supreme Court of Hawaii deprive petitioners of property without due process of law by deciding that the State owned property and that petitioners' claim to it were unsubstantiated, without giving petitioners any notice or opportunity to introduce evidence or argument to substantiate their claims which had been conceded by all parties throughout the proceedings?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Article I, Sec. 8:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

United States Constitution
Article III, Secs. 1 and 2:

> Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such

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premacy clause (Article VI) of the Constitution, and the Privileges and Immunities clause of the Fourteenth Amendment and the predecessor of 28 USC 1738, have been held by this Court to require state courts to give effect to federal judgments. All are invoked here by petitioners, who presented them to the court below.

inferior Courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . .

United States Constitution
Article IV, Sec. 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

United States Constitution
Fifth Amendment:

No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Fourteenth Amendment, Sec. 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . property, without due process of law; . . . .

28 USC § 1738:

. . . .

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, . . . .

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which from which they are taken. (June 25, 1948, c. 646, 62 Stat. 947)

Hawaii Revised Statutes
§ 1-1:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

Hawaii Revised Statutes
§ 7-1:

> *Building materials, water, etc.; landlords' titles subject to tenants' use.* Where the landlords have obtained, or may hereafter obtain allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, housetimber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

Section 7-1 is taken from Section 7 of the so-called "Act of Aug. 6, 1850," reprinted in 2 Revised Laws of Hawaii 1925, pp. 2141-2, reproduced Appendix B, *infra* p. 29.

*Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them.*

This report, usually called the "Land Commission Principles," was ratified by Legislative Council resolution on October 26, 1846. It is reprinted in 2 Revised Laws of Hawaii 1925, pp. 2124-2137, and pertinent portions in Appendiy B, *infra*, pp. 29-32).

## STATEMENT OF THE CASE

This case involves water rights in Hanapepe Valley on the Island of Kauai. Petitioners (G&R) own two valleys (Koula and Manuahi) in the central mountains of Kauai. These valleys join to form Hanapepe Valley, which runs 4½ miles south to the sea. Hanapepe is owned by the State but McBryde Sugar Company, Limited (McBryde) has large holdings at the seaward end, and there are small holdings in Hanapepe.

Since 1891, petitioners (and their predecessors in title) have taken water from Koula to irrigate their sugar plantation in the arid area to the west, Makaweli.[3]

In 1929, the Territory of Hawaii brought suit to enjoin this diversion. The Court of Appeals affirmed the judgment of the Supreme Court of Hawaii denying the injunction and held that G&R had the right to take the normal surplus water to Makaweli. *Territory* v. *Gay*, 31 Hawaii 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1934).[4]

In this case, the Supreme Court of Hawaii failed to give effect to that judgment, and abolished the settled principles of Hawaii water law by holding that all water belongs to the State and that G&R may not take any water out of the watershed.

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[3] *Territory* v. *Gay*, 31 Hawaii 376, 377-8 (1930) describes the valleys and irrigation systems; Kauai has mountains with 400-500 inches of rainfall a year within 15 miles of coastal areas with less than 15 inches.

[4] The first case, *Territory* v. *Gay*, 26 Hawaii 382 (1922), held that G&R, not the Territory, owned Koula; *Territory* v. *Gay*, 32 Hawaii 404 (1932), was dismissed *forum non conveniens* and later affirmed.

The taking by judicial decision of private property adjudicated by the Court of Appeals (52 F.2d 356, *cert. denied*, 284 U.S. 677 (1931), raised susbtantial federal questions. Whether the State may abolish its settled rules of property which have been relied on by the parties is also a substantial federal question. The decision and judgment in *Territory* v. *Gay* (*supra*) and prior judicial decisions refer to Hawaii's unique water law in the following terms:

### Hawaii Water Law Terms

The main islands in the Hawaiian chain consist of valleys radiating from rainy central areas to the sea. The basic land unit was the "*ahupuaa*," held by a chief directly from the King. It gave him a range of natural resources. It was divided into "*ili*" which he subinfeudated to lesser chieftains, who in turn subinfeudated to commoners. Their small holdings were "*kuleanas*." Some *ili* held directly from the king were "*ili kupono*" meaning independent *ili*. The chiefs required tenants to build irrigation dams and apportioned water which was essential to raise taro.[5] The chief of an *ahupuaa* or *ili* was called a "*konohiki*."

The concept of fee simple ownership was introduced in 1838-1856. The Board of Commissioners to Quiet Land Titles (the "Land Commission") in a report (Appendix B, *infra*, pp. 29-32) summarizes the ancient tenure as a tenancy in common in which king, chiefs and commoners had undivided interests. It recommended partition. The first step was the *Great Mahele* of 1848 in which each *konohiki* of an *ahupuaa* or *ili kupono* quitclaimed his interest in some of his lands to the king in exchange for a quitclaim from the king. This partition did not affect the commoners. The "Act of Aug. 6, 1850" (Appendix B,

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[5] The Hawaiian words for "law" (kanawai) and "property" (waiwai) are derived from the word for "water" (wai).

*infra* pp. 33-35)[6] authorized the Land Commission to award commoners lands. Their duties to the chiefs would cease, as would their rights in the chief's lands. King Kamehameha III insisted on the addition of Section 7, which provided that the grant of fee simple title to the chiefs would not terminate traditional rights of commoners. This is now Hawaii Revised Statutes § 7-1.

The statute did not define traditional water rights. This was done by the courts. Hutchins, *The Hawaiian System of Water Rights* 239-244[7] cites over 250 decisions of the Supreme Court of Hawaii on water rights. The basic terms of Hawaii water law are:

1. *Appurtenant rights.* A Land Commission award by the government carried with it the right to that quantity of water customarily used on the land at and immediately before the award, initially called "prescriptive." Later when it was decided that prescriptive rights could be acquired by adverse use, the term "appurtenant" was used. Appurtenant and prescriptive rights were easements.

2. *Surplus rights.* The *konohiki* owned all the water flowing from a source on his land except what was needed to meet the appurtenant and prescriptive rights of others.

3. *Transfer.* The owner of a water right was free to transfer water anywhere.

The Legislature in 1892 enacted what is now Hawaii Revised Statutes, § 1-1, adopting the common law "except as otherwise . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage." The Supreme Court of Hawaii found only one instance in Hawaii water law where precedent or usage did not exist. This was in *Carter* v. *Territory*, 24 Hawaii 47, 70 (1917). The court decided that in the very unusual situation of a stream running through two *ahupuaa*, all *"normal surplus"* belonged to the *konohiki* of the source, but that common law riparian doctrine applied to the *"storm and freshet"* surplus, which must be apportioned between the two *ahupuaa* in accordance with their needs.

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[6] The first four sections were passed on that date, Sections 5 and 6 were approved in principle by the 1850 Legislature, which adjourned recommending further study by the Privy Council, especially of Section 7.

[7] This is a comprehensive treatment of Hawaii water law, published in 1946 by the U.S. Department of Agriculture in cooperation with the Board of Water Supply of the City and County of Honolulu.

### Territory v. Gay

*Territory v. Gay*, 26 Hawaii 382 (1922) decided that Koula belonged to G&R because it was an *ili kupono*.

In *Territory* v. *Gay*, 31 Hawaii 376 (1930), 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931), the Territory made *two claims*: 1) While Koula and Manuahi were *ili kupono*, they were of lesser dignity than an *ahupuaa*, which owned all the surplus water; or 2) If an *ili kupono* is of equal status, the rule of *Carter* v. *Territory* should be applied to require all surplus water to be apportioned and used without transfer out of the watershed.

The trial court decided: 1) that *ili kupono* were of equal status with *ahupuaa*; 2) that the normal surplus belongs to G&R without limitation as to place of use; and 3) that G&R was taking no *storm and freshet* surplus. The Territory appealed to the Supreme Court of Hawaii and then to the Ninth Circuit, urging both claims. Both courts affirmed. This Court denied certiorari.

### Reliance

Thus G&R had a federal judgment that they owned the "normal surplus" and could take it to Makaweli. One part of the ditch, built in 1890-91, ran through wooden flumes which leaked and another across government land leased to G&R. This problem was solved by construction of a tunnel through G&R's land, connecting the old 1891 dams with Makaweli. Olokele Sugar Company, Limited (Olokele) leased some of G&R's sugar land in 1941. The lease guaranteed Olokele a share in the water. G&R and Olokele expended over $900,000 on the tunnel which opened in 1949.

## PRESENT PROCEEDINGS

In 1959, McBryde brought the present action, claiming appurtenant and prescriptive rights by adverse use and a share of the storm and freshet surplus. The State claimed appurtenant rights and a share in the storm and freshet surplus. Small owners claimed appurtenant rights. All parties agreed that G&R owned the normal surplus.[*] The pretrial order stipulated that Manuahi and Koula were *ili kupono* (Record Doc. No. 17, pp. 2, 3). All parties agreed that water could be transferred out of the watershed. The State claimed and was awarded appurtenant water rights of two parcels. (Amended Judgment, Record Doc. No. 34, Schedule B, Government Lots 6B and 54B). This was agreed to in the trial court and in the briefs and in argument on appeal.

## THE DECISION CREATES FEDERAL ISSUES

The Supreme Court of Hawai decided that:

(a) The Land Commission *Principles* meant that all water belongs to the State (54 Hawaii 187; Joint Appendix 79);

(b) The "Act of Aug. 6, 1850" (Hawaii Revised Statutes § 7-1) adopted Massachusetts riparian law, under which each riparian owner has the right to have the stream left in "its natural size and condition" (54 Hawaii 192-198; Joint Appendix 84-90);

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[*] *E.g.* Opening Brief of the State of Hawaii (Record Doc. No. 18, p. 18): "As held by our Supreme Court, Gay and Robinson as owner of the *ili* of Koula is entitled to the normal daily surplus in Hanapepe River." See also McBryde's Plaintiffs' Opening Brief (Record Doc. No. 19, pp. 1-2).

(c) There is no "normal daily surplus water" and *Territory* v. *Gay,* while *res judicata* between the State and G&R, decided that G&R owned property rights which did not exist (54 Hawaii 199, Joint Appendix 91);

(d) Appurtenant rights are characterized as "quaint" and the legislature is invited to examine the question (54 Hawaii 189, footnote 15; Joint Appendix 81);

(e) Koula is not an *ili kupono* (54 Hawaii 183; Joint Appendix 75).

The dissent pointed out that none of these issues had been tried below or raised on appeal (54 Hawaii 201, 202; Joint Appendix 93, 94).

G&R moved for a rehearing. A copy of its petition is Appendix A to this petition. The federal issues were raised in paragraphs 3 and 4. Rehearing was granted, but confined to two non-federal questions (Joint Appendix 108). No briefing or argument* on constitutional questions was allowed. Upon rehearing, the court adhered to its original opinion.

## REASONS FOR GRANTING THE WRIT

Petitioners present three federal questions:

1. The nullification of the judgment of the United States Court of Appeals;

2. The overruling of a century of settled Hawaii water law upon which petitioners had relied; and

3. The failure to give petitioners any opportunity to be heard or present evidence on the grave constitutional issues raised by the court *sua sponte.*

---

* Our motion to have a record made of oral argument was denied. (Joint Appendix 111, 113)

## I

## THE DECISION BELOW NULLIFIED THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS

*Territory* v. *Gay*, 31 Hawaii 376 (1930), *aff'd*, 52 F.2d 356 (9th Cir. 1931), *cert. denied*, 284 U.S. 677 (1931) was described as follows:

> This action was brought by the territory of Hawaii to enjoin the further diversion of the Koula stream and the Manuahi stream, tributaries of the Hanapepe river . . . These waters have been diverted for about forty years (since 1891) for the purpose of irrigating a sugar plantation belonging to the Hawaiian Sugar Company, Limited, a lessee of appellees Gay & Robinson. (52 F.2d 356)

The Territory made two claims to justify the injunction: a) that it owned all the surplus; or b) if G&R owned a share in the water, it could not take it out of the watershed (52 F.2d 357). The court rejected both claims, as had the lower courts.

The decision of the Supreme Court of Hawaii in the instant case ignores the fact that in *Territory* v. *Gay* (*supra*) the right to transport that water was the basic issue and decided. Justice Marumoto, dissenting, held the:

> decision effectively nullifies that holding to the extent that it denies G&R the right to divert the normal surplus water of Koula stream and Manuahi stream to Makaweli. (54 Hawaii 206; Joint Appendix 98)

The majority opinions treat *Territory* v. *Gay* as if no federal court had ever decided the case. They even omit the federal citation (52 F.2d 357 (1931), *cert. denied*, 284 U.S. 677 (1931)).

The Ninth Circuit had jurisdiction to review the judgments of the territorial supreme court on all questions, local territorial and federal law. Normally, it deferred to the opinion of the territorial courts on local questions;

however, it had the "power to reverse any ruling of the territorial court on law or fact" *Waialua Agricultural Co.* v. *Christian*, 305 U.S. 91, 108-109 (1938).

Furthermore, because during territorial status, title to all "territorial" property was in the United States, questions as to the Territory's property rights were federal questions. *United States* v. *Fullard-Leo*, 331 U.S. 256, 269-270 (1947). The statutory bases of the jurisdiction were cited by that court (52 F.2d 356-7).

The Supreme Court of Hawaii was bound to respect the judgment of the Ninth Circuit. This question has been considered by this Court in the following cases:

> *Embry* v. *Palmer*,
> 107 U.S. 3, 9 (1882);
>
> *Crescent Livestock Co.* v. *Butchers' Union*,
> 120 U.S. 141 (1887);
>
> *Hancock National Bank* v. *Farnum*,
> 176 U.S. 640 (1900);
>
> *Deposit Bank* v. *Frankfort*,
> 191 U.S. 499, 508, 515, 519 (1903);
>
> *Dupasseur* v. *Rochereau*,
> 21 Wall. 130 (1875);
>
> *Riverdale Mills* v. *Manufacturing Co.*,
> 198 U.S. 188 (1905);
>
> *Dowell* v. *Applegate*,
> 152 U.S. 327 (1894);
>
> *Louisville RR Co.* v. *Stockyards Co.*,
> 212 U.S. 132, 143 (1909);
>
> *Stoll* v. *Gottlieb*,
> 305 U.S. 165 (1938).

A federal judgment must be respected by the state courts, even though it followed a subsequently overruled state decision. *Deposit Bank* v. *Frankfort*, 191 U.S. 499 (1903).

fact that the Ninth Circuit no longer has appellate
diction over the Hawaii courts makes no difference.
ughes v. *Washington*, 389 U.S. 290 (1967), the United
s lost jurisdiction to convey tidelands when Washing-
became a state, but statehood did not give the state
power to deprive Mrs. Hughes of her right of accretion
her by the United States. That right remains one
ederal law. *Hughes* cannot be distinguished on the
y that a patent "creates" title, but a judgment "ad-
ates" it. Even among non-parties, it has the same
t as a deed between the parties. *Barr* v. *Gratz's Execu-*
4 Wheat. 213, 220 (1819) (giving that effect to a
al judgment). Restatement, *Judgments* § 110.

er does statehood diminish the importance of the ques-
Most states were formerly territories. The fact that
no longer possible to appeal to the Ninth Circuit to
t its judgment makes it all the more important for
Court to do so.

## II

## DECISION BELOW, BY OVERRULING SETTLED STATE LAW, DEPRIVED PETITIONERS OF PROPERTY WITHOUT DUE PROCESS OF LAW OR JUST COMPENSATION

roperty law is the creature of the state, but once cre-
its owners are protected by the Fourteenth Amend-
t. *Perry* v. *Sindermann*, 408 U.S. 593 (1972). If the
aii legislature had countered *Territory* v. *Gay*, with
it enacted: The normal surplus water of Koula and
uahi belongs to the State of Hawaii," there is no
tion but that it would have been an unconstitutional
rivation of property.

> he decision of the Supreme Court of Hawaii is as much
> te action as that of the legislature.
>
> *Brinkerhoff-Faris Co.* v. *Hill*,
> 281 U.S. 673 (1930)

> "The federal guaranty of due process extends to state action through its judical as well as its legislative, executive or administrative branch of government."
>
> *Shelley* v. *Kraemer*,
> 334 U.S. 1, 15 (1948)

Latitude is allowed for the judicial process of the common law, but there are limits to the extent to which it can overrule a rule of law to the detriment of a person who relied on it.

See:

*Muhlker* v. *Harlem Railroad Co.*,
197 U.S. 544 (1905);

*Sauer* v. *New York*,
206 U.S. 536 (1907);

*Chicago & Alton RR* v. *Tranbarger*,
238 U.S. 67 (1915);

*O'Neil* v. *North'n Colorado Irrigation Co.*,
242 U.S. 20 (1916);

*Brinkerhoff-Faris Co.* v. *Hill*,
281 U.S. 673 (1930);

*NAACP* v. *Alabama*,
357 U.S. 449 (1958);

*Cf.*:

*Bowie* v. *City of Columbia*,
378 U.S. 347 (1964);

*Hughes* v. *Washington*,
389 U.S. 290, 296 (1967)
(Stewart, J., concurring)

Included above are cases in which this Court decided that constitutional limits were not transgressed. We are *not* claiming that the Fourteenth Amendment makes *stare* is a constitutional imperative. There are clear dis- ions:

1. The new decision must be precisely contrary to the er law. Reasonable distinctions are constitutional, r v. *New York,* 206 U.S. 536 (1907). It is only when Court is "unable to reconcile the procedural holding with [the state court's] past unambiguous holdings" *ACP* v. *Alabama,* 357 U.S. 449, 456 (1958), or this rt finds "The state Supreme Court . . . announcing a . . . inconsistent with or opposed to its former deci- ," *St. Anthony Water Power Co.* v. *Water Commis- rs,* 168 U.S. 349, 371 (1897), that there is any un- titutionality. In contrast, *stare decisis* is based upon road policy concepts of earlier decisions.

the present case, the Supreme Court of Hawaii de- that the same property awarded G&R in *Territory y* now belongs to the State. The majority opinion is explicit that it is "self-correction" and that earlier ions "are overruled" (54 Hawaii 180; Joint Appen- 72*). There is no need to repeat in this petition the stration of the two dissenting opinions that this lved the overruling of the long-settled basic principles awaii water law.

2. *Stare decisis* is often applied on the presumption somebody, not necessarily the party before the court, relied. The party claming it must show actual reliance the earlier decision. There is no unconstitutionality if e has been "no different construction . . . that might lulled him to repose." *O'Neil* v. *North'n Colorado*

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*The Hawaii court characterized some of the precedents behind rritory v. *Gay* as dictum, apparently because the Territory was a party. *In re Taxes, Waiahole Water Co., Ltd.,* 21 Hawaii (1913), had upheld the property tax assessment of the surplus ter right the taxpayer leased for use elsewhere. The Hawaii preme Court upheld the Territory's contention that the mere ht to surplus water was property and taxable. The Territory as also a party to *Carter* v. *Territory* and *Territory* v. *Gay* itself.

*Irrigation Co.*, 242 U.S. 20, 26 (1916). *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682, n. 9 (1930). The full extent of G&R's reliance is not shown in the record because it was not in issue at trial, but some evidence of it came in on collateral issues, *e.g.*, G&R's 1941 lease to Olokele (Finding 21, Joint Appendix 10-11).

3. There must be a deprivation of life, liberty or property. A railroad held liable for flood waters which back up because it failed to put a culvert in its embankment is not deprived of property when the record shows it ran on trestles for many years. *Chicago & Alton RR* v. *Tranbarger*, 238 U.S. 67 (1915).

Under Hawaii law, water rights were property. *Kaneohe Ranch Co.* v. *Ah On*, 11 Hawaii 275 (1898), and *Brown* v. *Koloa Sugar Co.*, 12 Hawaii 409, 412 (1900), held they are real property. They were easements. *Appeal of A. S. Cleghorn*, 3 Hawaii 216, 218 (1870).

This Court has not been presented with many cases in which a state has overruled a whole body of law which has obviously been relied on. Nevertheless, though it seldom arises, it remains a "serious constitutional question." *Bonnelli Cattle Company* v. *Arizona*, —— U.S. ——, 94 S.Ct. 517, 528 (1973).

## III

## PETITIONERS WERE DEPRIVED OF PROPERTY WHEN ISSUES WERE DECIDED WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD

The decision below teems with decisions of fact on which G&R had no notice that they were in issue. The simplest example is at 54 Hawaii 183; Joint Appendix 75:

> Further, the finding that the ili of Koula was an *ili kupono* is not substantiated by the record.

This was admitted by all parties below. The pre-trial order provided:

> The ownership of land set forth in Exhibit 1 is admitted, and it is further admitted that the partners of Gay & Robinson . . . are the owners of the ilis kupono of Koula and Manuahi . . . . (R. Doc. No. 17, pp. 2-3)

That Koula was an *ili kupono* had been decided in *Ter- ory v. Gay*, 26 Hawaii 382 (1922). All parties admitted fact at pretrial. No question was ever raised. It was a privation of property without due process for the Su- me Court of Hawaii to find otherwise.

The leading case is *Saunders v. Shaw*, 244 U.S. 317 917). At trial in state court, plaintiff had offered evi- nce that a drainage district's work had not benefitted land. The trial judge excluded this evidence on the is that the statute creating the district was conclusive, t permitted an offer of proof. The defendant offered evidence to prove plaintiff's land was benefitted. The ate supreme court affirmed. Then on rehearing, it con- dered a recent decision of this Court, and reversed out hand, accepting the offer of proof as true. Defendant oved for rehearing, pointing out that he had had no tice that he needed to rebut the offer of proof. This was nied. This Court reversed the judgment of the state urt.

## IV

## THE FEDERAL ISSUES WERE TIMELY RAISED

This Court requires that federal questions be presented the state courts at the earliest stage that state law quires, usually at trial. However, when the federal issue created for the first time by a state supreme court on ppeal, the federal question may be raised on rehearing.

*Saunders v. Shaw*, 244 U.S. 317, 320 (1917)

Through trial and appeal, defendant was always told e did not have to prove plaintiff's land was benefitted.

On rehearing, plaintiff's offer of proof was not only held admissible, but accepted as true. Defendant petitioned for a second rehearing, raising for the first time his federal due process claim to a chance to prove the opposite, and was told that the state court's rules permitted no second rehearings. Nevertheless, this Court heard and decided the case because defendant had raised his federal claim at the earliest stage in the proceedings that it should have realized it was in jeopardy.

*Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673 (1930) is even more closely in point. Plaintiff sought review of his taxes in state court. The state supreme court held that he should have sought review from the state tax commission in spite of its earlier decision that such a course was "preposterous" and "unthinkable."

> The possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the supreme court filed its opinion. . . . (281 U.S. 677)

Plaintiff sought rehearing, invoking the Fourteenth Amendment for the first time. (281 U.S. 677-8)

The additional federal claim thus made was timely since it was raised at the first opportunity. (281 U.S. 678)

*See also*:

*NAACP* v. *Alabama,*
357 U.S. 449 (1958);

*Ohio ex rel. Bryant* v. *Akron Metropolitan Park District.*
281 U.S. 74 (1930);

*Missouri ex rel Missouri Insurance Co.* v. *Gehner,*
281 U.S. 313 (1930);

*Cole* v. *Arkansas,*
333 U.S. 196 (1948);

*Great Northern Ry. Co. v. Sunburst Co.*,
287 U.S. 358, 366 (1932)

The dissenting opinion of Mr. Justice Levinson points out that we could not be expected to anticipate the decision below and the federal issues it would create.

> . . . *McBryde I* is a totally unforseeable departure from prior cases of this court on the subject of water rights . . . . (55 Hawaii 302; Joint Appendix 156)
>
> Integral to the trial court's judgment were two principles of Hawaiian water law, which it considered to be solidly bottomed in Hawaiian judicial precedent and which were unquestioned by any of the parties. (55 Hawaii 265; Joint Appendix 119).
>
> In view of the wholly unexpected nature of the court's holdings in *McBryde I*, the parties of course could not have been expected to raise their constitutional claims as part of their appeals from the decision of the trial court. Since the parties asserted constitutional grounds for the reversal of McBryde I at the first possible instance—in their petitions for rehearing . . . (55 Hawaii 297; Joint Appendix 151)

As was pointed out by the earlier dissenting opinion of Mr. Justice Marumoto:

> That decision has no relation whatsoever to the judgment appealed from in this case, and is neither within the issues raised and tried in the circuit court nor within the questions presented and argued to this court. (54 Hawaii 201; Joint Appendix 93).

It is clear from Mr. Justice Levinson's dissent that the constitutional questions and federal question were squarely presented to the Supreme Court of Hawaii which we now petition this Court to review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1974

# APPENDIX A

No. 4379

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1972

Special Proceeding No. 108

ppeal From Final Judgment Dated January 30, 1969

Fifth Circuit Court

Honorable Benjamin M. Tashiro, Judge

cBryde Sugar Company, Limited, *Plaintiff-Appellant, Cross-Appellees,*

vs.

Aylmer F. Robinson, et al., *Defendants-Appellees, Cross-Appellants.*

## Petition for Rehearing on Behalf of Appellants, Selwyn A. Robinson, et al.

(Filed May 18, 1973)

Appellants Selwyn A. Robinson, et al., (hereinafter re-
rred to as "G&R") present this petition for rehearing.

### Preliminary Statement

The opinion of the Court decides questions not raised
low or on appeal. It is a denial of due process of law
d a taking of petitioners' property without just com-
nsation.

### Grounds for Rehearing

*1.* The decision overrules prior decisions holding:

a) The normal flow of a stream, subject to appur-
nant and prescriptive rights is "normal surplus water"

and is the property of the owner of the ahupuaa or ili kupono on which the stream has its source;

b) That the owner of water rights may transfer the water to other places outside the watershed;

c) That Koula is an ili kupono, not a part of the ahupuaa of Hanapepe.

*2.* The rules laid down in the decision, a) the State owns all surplus water and b) there is no such thing as surplus water because each riparian owner has a right to flow of a river or stream in its natural shape and size, are inconsistent with each other and with the prior decisions of this Court;

*3.* The decision, if enforced, would deprive G&R of property without due process of law and without just compensation, contrary to the Fourteenth Amendment to the Federal and Article I of the State constitutions by:

a) Overruling earlier decisions holding that the normal surplus water of a stream belongs to the konohiki or owner of the land on which it arises and he is free to transfer it out of the ahupuaa and watershed, and that Koula is an ili kupono G&R and its lessees have relied upon earlier adjudications and expended over $1,000,000 on dams and ditches for the transportation of water from Hanapepe to Makaweli; and

b) By deciding issues which were neither raised nor tried below nor presented on appeal thus depriving G&R of an opportunity to present evidence or argument on the issues raised by the Court *sua sponte*.

*4.* The decision is contrary to the judgment of the Court of Appeals in *Territory of Hawaii* v. *Gay, et al.*, 31 Hawaii 376 (1930), *affirmed* 52 F.2d 356 (1931), *cert. denied* 284 U.S. 677 (1931), thereby failing to give full faith and credit to the judgment and depriving G&R of property without due process of law and without just compensation, and of the privileges and immunities of citizens of the United States contrary to Article IV, Section 1, Article VI,

se 2 and the Fourteenth Amendment to the Federal
stitution and Article I, Sections 4 and 18 and Article
I, Section 2 of the State Constitution and contrary to
ticle III and the Supremacy Clause of Article VI of the
deral Constitution and the Act of June 25, 1948, c. 646,
Stat. 947 (28 USC Sec. 1738) and Article XVI, Section 2
the Constitution of the State of Hawaii.

*5.* The prior decisions of this Court that surplus water
longs to the konohiki and that water may be transported
t of the ahupuaa and watershed, were in accordance with
waiian custom. These rules were developed in response
Hawaii's climate and geography, in which abundant
pplies of water are found in watersheds unsuitable for
riculture or homes, but located near arid areas outside
natural watershed which were adapted to agriculture
d homes if, but only if, a sufficient supply of water could
brought to them. The principles of riparian law an-
unced in the present decision were laid down in England
d Massachusetts to ensure water power in a climate and
ography where irrigation was unnecessary and when
ansportation of water for domestic and urban purposes
s nonexistent. This rule if applied in Hawaii would
stroy the sugar industry and even the domestic water
pply of many of Hawaii's towns. It would arbitrarily
preclude the bringing of water to parts of Hawaii where
e natural water supply is insufficient for human existence.

WHEREFORE, appellants pray that the Court vacate its
pinion and enter a decision and judgment upon the issues
efore the Court on these appeals.

DATED: Honolulu, Hawaii, May 26th, 1973.

/s/ J. GARNER ANTHONY
J. Garner Anthony
/s/ JOHN H. R. PLEWS
John H. R. Plews

ANTHONY, HODDICK,
*Of Counsel*
EINWALD & O'CONNOR

*Attorneys for Appellants*
SELWYN A. ROBINSON, *et al.*

## CERTIFICATE

I HEREBY CERTIFY that this petition is presented in good faith and not for delay.

/s/ J. GARNER ANTHONY
J. Garner Anthony
*Attorneys for Appellants*
SELWYN A. ROBINSON, *et al.*

## APPENDIX Y

## A ALBARADO, ET AL., PETITION FOR A WRIT F CERTIORARI TO THE SUPREME COURT OF HAWAII, FILED IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1973 (EXCERPTS)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-

Albarado, Helen B. H. Chu, Henry J. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriet U. Kano, Junichi Kano, Kiyoshi Kimata, Arnold W. F. Leong, Katherine A. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Iwao Nonaka, Kazuo Nonaka, Masatoshi Nonaka, Shigekichi Nonaka, Takano Nonaka and Takao Nonaka, *Petitioners*,

v.

State of Hawaii, et al., *Respondents.*

### PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners Ida Albarado, Helen B. H. Chu, Henry J. Chu, Chee Kung Fui Society, Lapaz Francisco, Marcellino Francisco, Albert K. Kaailau, Linda P. Kaiakapu, Ann N. Kali, Harriett U. Kano, Junichi Kano, Kiyoshi Kimata, Arnold W. F. Leong, Katherine A. Leong, Lo Sun D. Leong, Tai Hing Leong, Hanayo T. Naumu, Wallace A. Naumu, Hideo Nonaka, Hiromi Nonaka, Iwao Nonaka, Kazuo Nonaka, Masatoshi Nonaka, Shigekichi

NONAKA, TAKANO NONAKA and TAKAO NONAKA, herein sometimes called collectively the "Small Owners", pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Hawaii entered in this cause on December 28, 1973.

## OPINIONS BELOW

The initial opinion of the Hawaii Supreme Court ("the court below") is reported, with dissenting opinion, at 54 Haw. 174 (1973), App. p. 66. That court's opinion on rehearing, with two dissenting opinions, dated December 20, 1973, is reported at 55 Haw. 260 (1973), App. p. 114. The Hawaii Fifth Circuit Court ("the trial court") Decision, is not reported. Copies of the opinions, the Decision of the trial court and of the Judgment of the Hawaii Supreme Court are included in a Joint Appendix separately presented on behalf of Petitioners herein, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and Selwyn A. Robinson, et al., all of whom seek review of the same judgment.

## JURISDICTION

The original decision of the court below was filed on January 10, 1973 and, before the entry of judgment thereon, a timely Petition for Rehearing was filed on May 18, 1973 by Petitioners. An order filed June 18, 1973 allowed partial rehearing. The opinion on rehearing was filed December 20, 1973, and judgment was entered on December 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Whether the court below, by its decision, which held, based upon a construction and application of Hawaii Rev. Stat. § 7-1, that all water in streams is property of the State, subject to riparian and appurtenant rights, and

at appurtenant waters may no longer be transferred
om the taro lands to which they were originally ap-
urtenant for use elsewhere, effecting a taking on behalf
f the State of Hawaii of Petitioners' property without
st compensation, in violation of the Due Process Clause
f the Fourteenth Amendment.

2. Whether the court below, by deciding the issue of
ansferability of appurtenant water rights, not raised on
ppeal by any of the parties, without prior notice to Peti-
oners and without granting Petitioners a hearing, has
far departed from the usual course of judicial pro-
edings as to constitute a denial of Petitioners' right to
hearing and a taking of property in violation of the Due
rocess Clause of the Fourteenth Amendment.

3. Whether the rules of federal law applicable to pro-
ct vested water rights enunciated in the provisions of
U.S.C. § 661 give federal protection to the Petitioners
the possessors and owners of vested rights in water
der recognized customs, laws and decisions of courts.

[Material Deleted in Printing]

# APPENDIX Z

## McBRYDE SUGAR CO., JURISDICTIONAL STATEMENT, OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI, FILED IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1973 (EXCERPTS)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

No. 73-

McBryde Sugar Company, Limited, and
Olokele Sugar Company, Limited, *Appellants*

v.

State of Hawaii, et al., *Appellees*

On Appeal from or Petition for a Writ of Certiorari
to the Supreme Court of Hawaii

## JURISDICTIONAL STATEMENT, OR, IN THE ALTERNATIVE, PETITION FOR A WRIT OF CERTIORARI

McBryde Sugar Company, Limited, and Olokele Sugar Company, Limited, appeal from the judgment of the Supreme Court of the State of Hawaii entered on December 28, 1973, which reversed in part and affirmed in part a decision of the Circuit Court of the Fifth Circuit, State of Hawaii, sitting as a Commissioner of Private Ways and Water Rights. In the alternative they petition for a writ of certiorari to review the judgment referred to.

## OPINIONS BELOW

The initial opinion of the Hawaii Supreme Court (with dissenting opinion) is reported at 54 Haw. 174, and 504 P.2d 1330, App. 66-101. The opinion on rehearing (with wo dissenting opinions), dated December 20, 1973, is reported in 55 Haw. 260, 517 P.2d 26, App. 114-158. The Decision of the Circuit Court (App. 1-65) is not reported. Copies of the opinions and of the Decision of the Circuit Court are included at the pages indicated in the separately bound Appendix to this Jurisdictional Statement.[1]

## JURISDICTION

The original decision of the Supreme Court of Hawaii was announced on January 10, 1973. (App. 66.) No judgment was entered. Timely petitions for rehearing were filed on May 18, 1973, and a partial rehearing was granted by an order filed June 18, 1973. (App. 108-109.) An order issued on June 29, 1973 made Olokele Sugar Company, Limited, a party to the rehearing. (App. 110.) The opinion on rehearing and two dissenting opinions were filed on December 20, 1973 (App. 114-158), and judgment was entered on December 28, 1973. (App. 159.)

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). In the event that the Court concludes that it does not have jurisdiction of the appeal, then the appeal should be treated as a petition for a writ of certiorari under 28 U.S.C. 2103. The jurisdiction of this Court is also invoked, in the alternative, under 28 U.S.C. 1257(3).

The question of the jurisdiction of this Court on appeal is discussed under Point I of this Jurisdictional Statement, at pp. 18-28, *infra*.

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[1] This is a joint Appendix, and is applicable in this case and in two other cases which are being filed to review the judgment of the court below.

The Clerk of the Supreme Court of Hawaii has certified part of the record there, and has transmitted it to the Clerk of this Court. This record consists of copies of original documents, and the pages are not consecutively numbered. Where is it necessary to refer to material in the original record, the references are made by the title of the original document, with the page number in that document.

## QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal in this case.

2. Whether the court below, by construing and applying Hawaii Rev. Stat. § 7-1 and Stat. L. Kamehameha III 81 *et seq.* (1947), contrary to long-established and accepted rules of property with respect to water rights in Hawaii, so as to divest water rights fixed by a prior adjudication and by usage in accordance with local custom, consistent judicial precedents and government recognition over a period of a century, has taken property without compensation in violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether the construction of Hawaii Rev. Stat. § 7-1 so as to render nugatory the judgment in the case of *Territory* v. *Gay* of the Supreme Court of Hawaii and of the Ninth Circuit Court of Appeals determining the ownership and the transferability of the normal surplus water of the Hanapepe River, is unconstitutional either under the Supremacy and Full Faith and Credit Clauses, or under the doctrine of *res judicata,* as made binding on the states (absent circumstances relevant under the Due Process Clause) by the Fourteenth Amendment.

4. Whether the court below by adjudicating on appeal substantial property rights in water not claimed or placed in issue in the case, without opportunity for presentation of the parties' defenses in law and fact, has so far departed from the usual court of judicial proceedings as to constitute the denial of the constitutional right to a hearing and a taking of property without due process of law, contrary to the requirements of the Fourteenth Amendment, warranting the intervention of this Court.

[Material Deleted in Printing]

## APPENDIX AA

## ORDER DEFERRING DECISION UNTIL DECISION OF THE SUPREME COURT OF HAWAII ON CERTIFIED QUESTIONS

### UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2264

SELWYN A. ROBINSON, *et al.*,
*Appellees,*

v.

GEORGE R. ARIYOSHI, Governor, *et al.*,
*Appellants.*

and

McBRYDE SUGAR COMPANY, LIMITED,
*Appellees.*

### ORDER

[Filed April 28, 1981]

Before: GOODWIN and TANG, Circuit Judges, and GRANT*, District Judge

Submission of this cause, argued September 8, 1980, is deferred until decision of the Hawaii Supreme Court on the questions certified to that court.

---

* The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana

# IN THE SUPREME COURT OF THE STATE OF HAWAII

SELWYN A. ROBINSON, *et al.*,
*Appellees*,

vs.

GEORGE R. ARIYOSHI, Governor, *et al.*,
*Appellants*,

and

McBRYDE SUGAR COMPANY, LIMITED,
*Appellees*.

## CERTIFIED QUESTIONS from the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## 9th Cir. No. 78-2264

The United States Court of Appeals for the Ninth Circuit presently has under submission *Robinson, et al v. Ariyoshi, et al*, No. 78-2264. *Robinson* is an appeal from the United States District Court for the District of Hawaii. That court granted an injunction prohibiting officials of the State of Hawaii from enforcing the Hawaii Supreme Court decision in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 502 P.2d 330, *aff'd on rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed for want of jurisdiction and cert. denied*, 417 U.S. 962 (1974). The district court found that enforcement of the *McBryde* decision would result in an unconstitutional taking of vested property rights.

Because of uncertainty concerning the proper interpretation of *McBryde, supra*, pursuant to Hawaii Supreme Court Rule 20, the United States Court of Appeals for the Ninth Circuit certifies the following questions:

(1) May any Hawaii state official execute on the judgment entered in *McBryde Sugar Co. v. Robinson, supra*, to enjoin Robinson, McBryde, Olokele, or the Small Own-

ers from diverting water from the Hanapepe or Koula watersheds?

(2) May the State of Hawaii claim collateral estoppel or bar and merger effect from *McBryde Sugar Co. v. Robinson, supra,* if the state brings an action either to quiet title to the water of the Hanapepe or to enjoin the diversion of water from the Hanapepe?

(3) Do the rulings in *McBryde,* with respect to water ownership and water diversion have binding precedential effect on the Hawaii state courts?

(4) Does *Territory v. Gay,* 31 Haw. 376 (1930) (Gay II), *aff'd,* 52 F.2d 356 (9th Cir.), *cert. denied,* 284 U.S. 677 (1931), preclude the State of Hawaii from bringing an action against Robinson, Okokeke, McBryde, or the Small Owners to enjoin them from diverting water from the Koula or Hanapepe watersheds?

(5) Does *McBryde, supra,* preclude any or all of the appellees from bringing an action in state court alleging that their property was taken without compensation in violation of the Fifth Amendment to the United States Constitution?

(6) Until *McBryde, supra,* was decided, had the issue of who owned surplus water been a settled question in Hawaii law?

Dated this 28th day of April, 1981.

/s/ James R. Browning
Chief Judge

## APPENDIX BB

## ORDER OF ASSOCIATE JUSTICE WILLIAM H. REHNQUIST

## SUPREME COURT OF THE UNITED STATES

No. A-53

GEORGE R. ARIYOSHI, GOVERNOR OF HAWAII, *ET AL.*,
*Applicant,*

v.

Selwyn A. Robinson, *et al.*

### ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 11, 1985.

/s/ William H. Rehnquist
Associate Justice of the Supreme
Court of the United States

Dated this 19th
day of July, 1985.

# APPENDIX CC

## HAWAIIAN STATUTES GOVERNING LAND COMMISSION POWER AND PRIVATE RIGHTS TO WATER

**Stat. L. Kamehameha III 81 et seq.**
**Reprinted Rev. L. Hawaii (1925), Vol. II,**
**Appendix 2124 et seq.**

### PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM

When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining however, a portion in his hands, to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the hands of four, five or six persons, from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.

* * *

All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down.

* * *

It is therefore certain that the tenure was far from being allodial, either in principle or practice; . . . The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land; the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust. But when he put it in the hands of a third person, that third person bore a similar relation to him that he did to the King. The superior always had the power at pleasure to disposses his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords.

* * *

Such was the nature of the tenures, and such the titles by which the lands were held, when in 1839 protection was declared both for person and property, in the following words: "Protection is hereby secured to the persons of all the people; together with their lands, their building lots, and all their property." (See Declaration of Rights, p. 10 of translation.)

* * *

It seems natural then, and obviously just, that the King, in disposing of the allodium, should offer it first to the superior lord, that is to the person whom originally received the land in trust from the King; since by doing so, no injury is inflicted on any of the inferior lords or tenants, they being protected by law in their rights as before; and most obviously the King could not dispose of the allodium to any other person without infringing on the rights of the superior lord. But even when such lord shall have received an allodial title from the King by purchase or otherwise, the rights of the tenants and sub-tenants must still remain unaffected, for no purchase, even from the sovereign himself, can vitiate the rights of third parties. The lord, therefore, who purchases the allodium, can no more seize upon the rights of the tenants and dispossess them, than the King can now seize upon the rights of the lords, and dispossess them. This appears clear, not only from the first principles of justice, but also from the act of 1839, declaring protection for tenants as well as for landlords.

* * *

Although the above facts and principles are most perfectly clear and unquestionable, yet great evils have existed down to the present moment, owing mainly to the circumstance that several different classes of persons had undivided rights in the same lands, and each class was very liable to claim more than the due proportions. In such cases, lords, or persons of superior power or rank have generally been the oppressors, and perhaps there are none of those classes, from the throne down, who have not sometimes taken advantage of the powerless in this respect. Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

The decisions of an executive board would be so far surrenders of the Chief Executive Magistrate, who has approved the powers conferred upon that Board, as to be an authorization from him to adjust all the past tenures in the manner most equitable, and if abstractly just, power to alienate for him any rights, which he as King could surrender in regard to these lands. The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the Commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands, are the following:

1st. To punish for high treason by forfeiture, if so the law decrees.

2nd. To levy taxes upon every tax yielding basis, and among other lands, if so the law decrees.

3rd. To encourage and even to enforce the usufruct of lands for the common good.

4th. To provide public thoroughfares and easements, by means of roads, bridges, streets, etc., for the common good.

5th. To resume certain lands upon just compensation assessed, if for any cause the public good or the social safety requires it.

These prerogatives, powers and duties, His Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board, and the titles consequent upon them must be understood subject to these conditions.

• • •

### RESOLUTION OF THE LEGISLATIVE COUNCIL

The principles adopted by the Board of Commissioners to quiet Land Titles, under date of August 20th, 1846, having been read before the Nobles and Representatives of the people, in Legislative Council assembled, and having been carefully considered, it was,

**Resolved**, That the same are hereby approved; and it is enacted that from the date hereof, all claims for landed property in this kingdom shall be tested by those principles, and according to them be confirmed or rejected.

KAMEHAMEHA

KEONI ANA
Council House, Honolulu
Oct. 26, 1846

## Hawaii Revised Statutes § 7-1
## (Derived From Act of August 6, 1850, Sec. 7)

**Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

## Enactment of Further Principles, Act of August 6, 1850, 1850 Hawaii Sess. L. 202, Reprinted Rev. L. Hawaii (1925) Vol. II, Appendix 2141-2142

AN ACT CONFIRMING CERTAIN RESOLUTIONS OF THE KING AND PRIVY COUNCIL, PASSED ON THE 21ST DAY OF DECEMBER, A. D. 1849, GRANTING TO THE COMMON PEOPLE ALLODIAL TITLES FOR THEIR OWN LANDS AND HOUSE LOTS, AND CERTAIN OTHER PRIVILEGES.

BE IT ENACTED by the House of Nobles and Representatives of the Hawaiian Islands, in Legislative Council assembled:

That the following sections which were passed by the King in privy council on the 21st of December, A. D. 1849, when the legislature was not in session, be and are hereby confirmed; and that certain other provisions be inserted, as follows:

1. That fee-simple titles, free of commutation, be and are hereby granted to all native tenants, who occupy and improve any portion of any government land, for the lands they so occupy and improve, and whose claims to said lands shall be recognized as genuine by the land commis-

sion: Provided, however, that this resolution shall not extend to konohikis or other persons having the care of government lands, or to the house lots and other lands in which the government have an interest in the districts of Honolulu, Lahaina and Hilo.

2. By and with the consent of the King and the chiefs in privy council assembled, it is hereby resolved, that fee-simple titles, free of communtation, be and are hereby granted to all native tenants who occupy and improve any lands other than those mentioned in the preceding resolution, held by the King or any chief or konohiki for the land they so occupy and improve:

Provided, however, that this resolution shall not extend to house lots or other lands situated in the districts of Honolulu, Lahaina and Hilo.

3. That the board of commissioners to quiet land titles be, and is hereby empowered to award fee-simple titles in accordance with the foregoing resolutions; to define and separate the portions of lands belonging to different individuals; and to provide for an equitable exchange of such different portions, where it can be done, so that each man's land may be by itself.

4. That a certain portion of the government lands in each island shall be set apart, and placed in the hands of special agents, to be disposed of in lots of from one to fifty acres, in fee-simple, to such natives as may not be otherwise furnished with sufficient land, at a minimum price of fifty cents per acre.

5. In granting to the people, their house lots in fee-simple, such as are separate and distinct from their cultivated lands, the amount of land in each of said house lots shall not exceed one quarter of an acre.

6. In granting to the people their cultivated grounds, or kalo lands, they shall only be entitled to what they have really cultivated, and which lie in the form of cultivated lands; and not such as the people may have cultivated in

different spots, with the seeming intention of enlarging their lots; nor shall they be entitled to waste lands.

7. When the landlords have taken allodial titles to their lands, the people on each of their lands, shall not be deprived of the right to take firewood, house timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use, should they need them, but they shall not have a right to take such articles to sell for profit. They shall also inform the landlord or his agent, and proceed with his consent. The people also shall have a right to drinking water, and running water, and the right of way. The springs of water, and running water, and roads shall be free to all, should they need them, on all lands granted in fee-simple: Provided, that this shall not be applicable to wells and water courses which individuals have made for their own use.*

Done and passed at the council house in Honolulu, this 6th day of August, A. D. 1850.

KAMEHAMEHA.

KEONI ANA.

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* This s. was amended by L. 1851, p. 98, by striking out the second sentence and also the words "should they need them" twice, and, slightly modified, it is C. C. 1859, s. 1477; Cp. L. s. 1477; C. L. s. 2138, s. 576 of this Revision. . . .

## APPENDIX DD

### JURISDICTION OF THE SUPREME COURT OF HAWAII AND RELATED STATUTES, REPRINTED FROM HAWAII REV STAT.
(1968 & 1976 eds.)

§ 602-1 **How constituted.** The supreme court, pursuant to section 2 of article V of the Constitution, shall consist of a chief justice and four associate justices.

* * *

§ 602-5 **Jurisdiction and powers.** The supreme court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on exceptions, error, or appeal duly perfected from any other court, judge, magistrate, or tribunal, according to law or by reservation of any circuit court or judge; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibition, and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals and returnable before the supreme court. The supreme court and the several justices thereof in aid of the appellate jurisdiction of the court may issue writs of mandamus, certiorari, prohibition, and habeas corpus and all other writs necessary or proper to the complete exercise of the appellee jurisdiction of the court. Each of the justices shall have original jurisdiction and power to issue writs of habeas corpus and may make the writs returnable before himself or the supreme court or before any circuit court or any judge thereof.

* * *

§ 602-13 **Additional argument by counsel.** Upon all questions arising under the exercise of the jurisdiction of the supreme court, when argument of counsel is desired or intended by the parties, or is requested by the court, the court may order the argument to be had. After the argument of any cause, or when the cause is submitted on briefs, if the court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the point or proposition before the court.

* * *

§ 602-16 **Rules** The supreme court may, from time to time, make rules for regulating the practice and conducting the business of the court, and also rules governing the administration of other courts, and thereafter revise the rules at its discretion. In no case shall the court have power to impose costs not expressly authorized by law. The supreme court may prescribe for use in the several courts of the State such forms as it may deem convenient and sufficient. If printed at public expense, they shall be sold at such prices as will pay their cost.

[On July 1, 1973, during the pendency of *McBryde II*, the Act of May 19, 1972, ch. 88, 1972 Hawaii Sess. L. 325-88, took effect. The Act repealed Hawaii Rev. Stat. § 602-13 (1968), reprinted above, and rewrote the Supreme Court of Hawaii's jurisdiction. The following is reprinted from Hawaii Rev. Stat. (1976).]

§ 602-5 **Jurisdiction and powers.** The supreme court shall have jurisdiction and powers as follows:

(1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it on any appeal allowed by law from any other court or agency;

(2) To answer, in its discretion, any question of law reserved by a circuit court, the land court, or the tax appeal court, or any question or proposition of law certified to it by a federal appellate court if the supreme court shall so provide by rule;

(3) To entertain, in its discretion, any case submitted without suit when there is a question in difference

which might be the subject of a civil action or proceeding in the supreme court, circuit court, or tax appeal court, [and] the parties agree upon a case containing the facts upon which the controversy depends;

(4) To exercise original jurisdiction in all questions arising under writs directed to courts of inferior jurisdiction and returnable before the supreme court, or if the supreme court consents to receive the case arising under writs of mandamus directed to public officers to compel them to fulfill the duties of their offices; and such other original jurisdiction as may be expressly conferred by law;

(5) To issue writs of habeas corpus, or orders to show cause as provided by chapter 660, returnable before the supreme court or a circuit court, and any justice may issue writs of habeas corpus or such orders to show cause, returnable as above stated;

(6) To make or issue any order or writ necessary or appropriate in aid of its appellate or original jurisdiction, and in such case any justice may issue a writ or an order to show cause returnable before the supreme court;

(7) To make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

## APPENDIX EE

## TION OF THE CIRCUIT COURTS OF
## II SITTING AS COMMISSIONERS
## OF WATER RIGHTS,
## NTED FROM HAWAII REV. STAT
## (1968 & 1976 eds.)

**finitions.** Wherever used in this part: "com-
fers to the judge of the circuit court within
perty affected is situated. "Court" means
court. "Party" or "parties" means the re-
es to the controversy, before the judge or
roversy" means the matter or question at
the judge or court. "Private individuals or
ns either individuals, companies, or corpora-
others except the State.

**risdiction.** The circuit judges shall have jur-
ar and determine all controversies respecting
vate ways and water rights, as in this part

**rocedure; notice, posting, or publication; ap-**
ithin their respective circuits the judges shall
ermine all controversies respecting rights of
and water rights, between private individuals,
rivate individuals and the State. Any person
the State, may apply for the settlement of
volved hereunder. Thereupon the judge shall
en or printed summons in like form as that
a circuit judge at chambers to the party or
dant. It shall be served personally upon each
or occupant having an interest in the contro-
ver the owner or occupant can be found. If the
cupant cannot be found for the service, the
cause a notice or notices in the English or
guage, as he deems most efficient, to be given
sting upon the premises the owners or occu-
of cannot be found, or by insertion in one or

more newspapers, which publication shall continue for at least two full weeks prior to the date set for hearing. The notice shall designate the time and place of hearing; shall indicate the nature of the application made; and shall notify all parties interested to attend and prove their rights or they will be adjudicated without such attendance, besides any other matter deemed important by the judge. The notice may be published in any case in the discretion of the judge. No summons shall be set aside or dismissed because of any technical informality, provided it sets forth the time and place of hearing, and the nature of the right claimed, in terms sufficiently clear for the apprisal of all parties interested. Parties may appear personally or by attorney.

**§ 664-34 Same; hearing, decision, record.** At the time set for hearing, service of summons or publication of notice having been proved, the judge shall hear the evidence offered relative to the right in controversy, and shall, as far as possible, ascertain the rights of absent parties not served where notice as herein provided has been published. He may, if deemed desirable or conclusive to the rendering of a correct decision, visit the locality where the controversy arose. He shall give such decision as may in each particular case appear to be in conformity with vested rights and shall be just and equitable between the parties.

The decision shall state expressly the findings of fact on the evidence, and shall in cases of right of way clearly indicate the location (if possible) and nature of the way; if on a water right, it shall state the proportion of time for use, and any other things necessary to the right. It may also regulate the methods by which water may be obtained, and by which its supply can be controlled.

All of the testimony and the decision shall be recorded in books of record to be kept and preserved by the judge. The books, when filled, shall be deposited with the clerks of the respective courts.

The decisions of the several judges shall be final and binding upon all parties except those who may be absent

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e State without a legal representative in the State
he whole time of the pendency of the controversy,
o the right of appeal.

**35 Costs.** There may be taxed as costs in cases
hereunder, besides the usual statutory costs as
by district courts for service, summons, oaths, and
se, not over 20 cents a folio for copies of the evi-
nd decision either on appeal or as furnished to any
The costs may, in the discretion of the judge, be
or taxed to the losing party. In case of appeal the
ard as to costs shall abide the decision of the court.

**36 Appeal.** Any party aggrieved by the decision
udge may appeal therefrom to the supreme court
ten days from the rendition of the decision and
uch period shall pay all costs accrued and for cer-
and record on appeal, and shall deposit costs for
as provided by sections 607-6 and 607-7. In case of
the judge shall promptly transmit to the clerk of
t a copy of the record, together with any exhibits
e deposit for costs, and all costs not strictly retain-
him or actually disbursed. The court may permit
oduction of new evidence which could not with due
e have been obtained before, and its decision shall
and binding except as to parties absent as afore-

**37 Judges, powers.** The judges shall have power
nister oaths, to punish contempts, to grant adjourn-
o subpoena and compel the attendance of witnesses,
execution for costs, to enforce the specific perform-
judgment, and generally to exercise the same au-
in regard to their jurisdiction, as is by law con-
pon circuit judges at chambers.

ly 1, 1973, during the pendency of *McBryde II*, the
May 19, 1972, ch. 90, 1972 Hawaii Sess. L. 351-68,
fect. The Act amended the statutes reprinted above
to the jurisdiction of the Circuit Courts of Hawaii.
llowing amended version of those statutes is re-

printed from Hawaii Rev. Stat. (1976), which is still in effect.]

**§ 664-31 Definitions.** Wherever used in this part:

"Controversy" means the matter or question at issue before the court.

"Private individuals or persons" means either individuals, companies, or corporations, or any others except the State.

**§ 664-32 Jurisdiction.** The circuit courts shall have jurisdiction to hear and determine, without the intervention of a jury, all controversies respecting rights of private way and water rights, as in this part provided.

**§ 664-33 Procedure; notice.** The circuit courts shall hear and determine all controversies respecting rights of private way and water rights, between private individuals, or between private individuals and the State. Any person interested, or the State, may apply for the settlement of any rights involved hereunder by filing a complaint in the circuit court of the circuit in which the property affected is situated. Thereupon the court shall issue a summons to each land owner or occupant having an interest in the controversy. A notice of the pending action may be published in any case in the discretion of the court.

**§ 664-34 Same; decision.** The court shall hear the evidence offered relative to the right in controversy, and may, if deemed desirable to the rendering of a correct decision, visit the locality where the controversy arose. It shall give such decision as may in each particular case appear to be in conformity with vested rights and shall be just and equitable between the parties.

The decision shall state expressly the findings of fact on the evidence, and shall in cases of right of way clearly indicate the location (if possible) and nature of the way; if on a water right, it shall state the proportion of time for use, and any other things necessary to the right. It may

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ulate the methods by which water may be obtained,
which its supply can be controlled. As far as possi-
rights of parties served by publication who have
eared in the action shall be ascertained. Judgment
entered in accordance with the decision.

35 **Costs.** Costs may, in the discretion of the court,
ied, or taxed to the losing party.

36 **Appeal.** Any party aggrieved by the judgment
ourt may appeal therefrom to the supreme court in
nner and within the time provided by the rules of

## APPENDIX FF

## RULE 5 (1968) AND RULE 20 (1980) OF THE SUPREME COURT OF HAWAII

### RULE 5. REHEARING

(a) *Time and Form.* A petition for rehearing may be presented only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a justice. The petition shall briefly and distinctly state its grounds and shall include points and authorities relied on in support thereof and shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay.

(b) *Argument; Reply; Allowance.* No reply to a petition for rehearing will be received unless requested by the court or by a justice who concurred in the opinion or ruling and no petition for rehearing will be granted in the absence of such a request. There shall be no oral argument on a petition for rehearing.

### Rule 20. CERTIFICATION OF QUESTION OF HAWAII LAW BY FEDERAL APPELLATE COURTS.

**(a) When Certified.** When it shall appear to the Supreme Court of the United States, or to any court of appeals of the United States, that there is involved in any proceeding before it a question concerning the law of Hawaii which is determinative of the cause, and that there is no clear controlling precedent in the decisions of this court, such federal appellate court may certify such question to this court, which certificate this court, by written opinion, may answer.

**(b) Method of Invoking Rule.** The provisions of this rule may be invoked by any federal court referred to in this rule upon its own motion or upon the suggestion or motion of any interested party when approved by such court.

c) **Contents of Certificate.** The certificate provided for
ein shall contain the title of this court and the title of
cause in full, and to the right thereof the words "Cer-
d Question" and the name of the court submitting or
roving the submission of the question. The certificate
l also contain a statement of prior proceedings in the
e, a statement of facts showing the nature of the cause,
question of law to be answered, and the circumstances
of which the question arises.

d) **Preparation of Certificate.** The certificate may be
pared by stipulation or as directed by such federal court.
en prepared, and signed by the presiding judge of such
eral court, it shall be certified to this court by the clerk
he federal court and under its official seal. This court
, in its discretion, require the original or copies of all
ny portion of the record before the federal court to be
l with the certificate if, in the opinion of this court, such
ord may be necessary in the determination of said cause.

) **Briefs.** Briefs conforming to the rules of this court
l be filed by the parties within the times provided by
rules of this court, the opening brief to be filed by the
ant or appellant within 60 days after certification to
court of the question to be answered.

) **Oral Argument.** Unless otherwise ordered by this
t, oral arguments conforming to the rules of this court
be allowed.